Supreme Court, U. S.
FILED
APR 2 1979
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1506

ROBERT W. MACE,
PETITIONER,

v.

BYRON J. MATTHEWS,
MAYOR OF THE CITY OF NEWBURYPORT,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts.

FRANCIS J. O'ROURKE,
75 Federal Street, Suite 600,
Boston, Massachusetts 02110.
(617) 542-0896
Counsel for Petitioner.

Of Counsel:
BRICKLEY, SEARS & COLE,
75 Federal Street, Suite 600,
Boston, Massachusetts 02110.
(617) 542-0896

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

Table of Contents.

Opinions below	2
Jurisdiction	2
Question presented	2
Statute involved	3
Statement of the case	4
Reasons for granting the writ	8
I. Introduction	8
II. The rulings below have foreclosed the petitioner from judicial review of properly joined, genuine constitutional issues of substantive and procedural due process	12
A. Substantive due process issues	12
B. Procedural due process issues	15
III. The rulings below are in conflict with the plain terms of Rule 56 of the Rules of Civil Procedure of the Commonwealth of Massachusetts and with the decisions of this Court establishing the constitutional standards to be applied thereto	17
Conclusion	22
Appendix	follows page 22

Table of Authorities Cited.

Cases.

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970)	21
Arnett v. Kennedy, 416 U.S. 134 (1974)	12

Askew v. Hargrave, 401 U.S. 476 (1971) 21
Associated Press v. United States, 326 U.S. 1 (1945) 19, 20
Bell v. Burson, 402 U.S. 535 (1971) 17
Bishop v. Wood, 426 U.S. 341 (1976) 13, 14, 15, 19
Board of Regents v. Roth, 408 U.S. 564 (1972) 12, 13, 14
Canney v. Municipal Court of the City of Boston, 368 Mass. 648, 335 N.E. 2d 651 (1975) 18
Chaddock v. Briggs, 13 Mass. 248, 7 Am. Dec. 137 (1816) 14
Giaccio v. Pennsylvania, 382 U.S. 399 (1966) 22
Hoffman v. Babbitt Bros. Trading Co., 203 F. 2d 636 (9th Cir. 1953) 18, 19
Hoke v. Retail Credit Corp., 521 F. 2d 1079 (4th Cir. 1975), cert. den. 423 U.S. 1087 (1976) 19
Kennedy v. Silas Mason Co., 334 U.S. 249 (1948) 21
Mathews v. Eldridge, 424 U.S. 319 (1976) 17, 18
Moore v. City of East Cleveland, 431 U.S. 494 (1977) 17
Morgan v. United States, 304 U.S. 1 (1938) 16
Morrissey v. Brewer, 408 U.S. 471 (1972) 17
Mourning v. Family Pub. Serv., Inc., 411 U.S. 356 (1973) 21
Paul v. Davis, 424 U.S. 693 (1976) 14, 15
Perry v. Sindermann, 408 U.S. 593 (1972) 16
Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962) 21
Powers v. District Court of Southern Essex, 2 Mass. App. Ct. 816, 309 N.E. 2d 889 (1974) 16
Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944) 21

Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) 17
Stanley v. Illinois, 405 U.S. 645 (1972) 16
State of Oregon v. United States, 195 F. Supp. 276 (D. Ore. 1961), aff'd, 308 F. 2d 568 (9th Cir. 1962), cert. den. 372 U.S. 941 (1963) 19
Stubbs v. United States, 428 F. 2d 885 (9th Cir. 1970), cert. den. 400 U.S. 1009 (1971) 21
United States v. Diebold, Inc., 369 U.S. 654 (1962) 19
Williams v. Chick, 373 F. 2d 330 (8th Cir. 1967) 20
Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) 16, 22

Constitutional and Statutory Provisions.

United States Constitution
Fifth Amendment 12
Fourteenth Amendment 3, 8, 9, 11, 12, 13, 14 et seq.
28 U.S.C. § 1257(3) 2
42 U.S.C. § 1983 13
G.L. c. 31
§ 20D 3, 5, 8, 9
§ 34 3
§ 43 4
§ 46A 4
G.L. c. 231A, § 1 4, 18

PROCEDURAL RULES.

Federal Rules of Civil Procedure
Rule 56 18, 19
Rule 56(e) 21
Massachusetts Rules of Civil Procedure
Rule 56 2, 17, 18, 19, 20, 21
Rule 56(b) 1, 2, 3, 6, 7, 9, 10 et seq.
Rule 56(c) 8, 19
Rule 56(e) 8
Rule 57 18

MISCELLANEOUS.

Wright & Miller, Federal Practice and Procedure: Civil (1973) 21

In the Supreme Court of the United States.

OCTOBER TERM, 1978.

No. .

ROBERT W. MACE,
PETITIONER,

v.

BYRON J. MATTHEWS,
MAYOR OF THE CITY OF NEWBURYPORT,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts.

The petitioner respectfully prays that a writ of certiorari issue to the Supreme Judicial Court of Massachusetts to review the judgment thereof entered November 24, 1978, affirming the entry of a Rule 56(b) summary judgment against the petitioner by the Superior Court of Massachusetts on February 13, 1978, and that the judgment below be reversed.

Opinions Below.

There were none.

The Supreme Judicial Court's entry, after submission of briefs and argument, was dated November 25, 1978, is reprinted in its entirety in the appendix hereto at App. 25a, and consists of the two words: "Judgment affirmed." A petition for rehearing was filed on December 4, 1978, and denied December 15, 1978 (see copy of that court's docket certified on February 7, 1979, reprinted in the appendix hereto at App. 24a-25a).

No opinion was rendered by the Massachusetts Superior Court. The respondent's Rule 56(b) motion for summary judgment was granted on February 13, 1978, by appropriate entries of that date on its face, including the word "Allowed," and relevant entries on the Superior Court docket sheet (see copy of motion for summary judgment, reprinted in the appendix hereto at App. 22a; copy of Massachusetts Superior Court summary judgment (Mass. R. Civ. P. 56) also dated 2/13/78, reprinted in the appendix hereto at App. 23a-24a, and Superior Court docket entries, reprinted in the appendix hereto at App. 1a-2a).

Jurisdiction.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Question Presented.

Where a non-mandatory hearing is convened by the public authority to hear misconduct charges against a regular but

probationary police officer, he is excluded therefrom, denied the right of confrontation and cross-examination of testimony of perjurious witnesses, and then discharged by notice incorporating the perjury as findings of fact, may a state civil service statute, providing for summary dismissal of regular probationary police officers without hearing, be invoked under Rule 56(b) of the Rules of Civil Procedure so as to preclude trial of the issues of perjury and Fourteenth Amendment due process infirmities in the dismissal notice and the hearing?

Statute Involved.

The principal state statute apparently relied upon by both Massachusetts courts formerly was to be found in chapter 31 of the Massachusetts General Laws at § 20D (now c. 31, § 34), a complete reproduction of which is to be found in the appendix hereto at App. 33a-35a. It recited in pertinent part:

> § 20D. Probationary period. . . . "[I]n the case of a person appointed as a regular police officer in any city or town, . . . the probationary period shall be nine months.
>
> . . . . . .
>
> "If the conduct or capacity of a person serving a probationary period under an appointment in the official service or labor service, or the character or quality of the work performed by him, is not satisfactory to the appointing authority, he may, at any time after such person has served thirty days and prior to the end of such probationary period, give such person a written notice to that effect, stating in detail the particulars wherein his

> conduct or capacity or the character or quality of his work is not satisfactory, whereupon his service shall terminate. The appointing authority shall at the same time send a copy of such notice to the administrator. In default of such a notice, the appointment of such person shall become permanent upon the termination of such period . . .."

Also printed in the petitioner's "Brief for Plaintiff-Appellant" in the lower court were: (1) G.L. c. 31, § 43, "Tenure; Discharge, Removal, Transfer, Abolition of Office, etc.; Notice; Hearing; Review; Reinstatement; Punishment Duty; Reimbursement For Defense Expenses"; (2) G.L. c. 31, § 46A, "Petition For Writ of Mandamus; Jurisdiction; Procedure For Reinstatement"; and (3) G.L. c. 231A, § 1, "Power to Make Declaratory Determinations; Jury Questions," all reproduced in the appendix hereto at App. 35a-43a.

Statement of the Case.

Because no written decisions or opinions were entered by either of the Massachusetts courts, a chronological statement of the case follows, tracking the pleadings and docket entries.

The petitioner commenced his action in the Superior Court by a complaint filed on October 13, 1976, consisting of 20 paragraphs, amended on January 5, 1978, to include a 21st. Copies of the complaint and petitioner's motion to amend plaintiff's complaint (containing paragraph 21 thereto) are included in the appendix hereto at App. 2a-18a, 21a.

In substance, the complaint alleged:

> (1) that the plaintiff (petitioner herein) had been appointed a permanent police patrolman in the City of Newburyport on November 24, 1975, and while serving a "probationary period" on April 13, 1976, was by letter notice of the defendant Mayor of Newburyport discharged from his employment for certain enumerated malfeasances allegedly committed in the course of petitioner's official conduct (Complaint, ¶¶ 1-4, 9, 13-16, App. 2a-3a, 4a, 5a-6a);
>
> (2) that the procedures and communications, including notice of hearing dated April 1, 1976 (Complaint, Ex. B, App. 11a-12a), utilized by the respondent were insufficient, unlawful, and extra-legal under various state and local laws and regulations, including the sufficiency of notice of discharge under c. 31, § 20D, dated April 13, 1976 (Complaint, Ex. A, App. 8a-10a) (Complaint, ¶¶ 5-11, App. 3a-5a);
>
> (3) that with regard to a hearing not mandated by § 20D but afforded on April 8, 1976, ". . . under the provisions of the Fourteenth Amendment to the Constitution of the United States, affording each citizen due process, the plaintiff was not given a full hearing, for the reason that the plaintiff was excluded from the hearing room on the order of the defendant while witnesses were examined" (Complaint, ¶ 12, App. 5a);
>
> (4) that the evidence presented at the said hearing upon which both the dismissal and notice of dismissal of the petitioner by the respondent were based contained perjured testimony against the petitioner coerced, procured, and also committed by a named person (Complaint, ¶ 17, App. 6a; Motion to Amend Plaintiff's Complaint, containing ¶ 21, App. 21a);
>
> (5) that the evidence favoring dismissal was insufficient, that the dismissal of the petitioner was "arbitrary, capricious, unjust, unsupported by substantial evidence, and in violation of rights guaranteed to the plaintiff,

under the due process provisions of the Constitution of the Commonwealth of Massachusetts of the [*sic*] Constitution of the United States" (Complaint, ¶¶ 18 and 19, App. 6a) and that the petitioner had no adequate remedy at law (Complaint, ¶ 20, App. 6a).

(The complaint, all its exhibits, and the other pleadings alluded to in this petition were reprinted within the record appendix docketed in the Supreme Judicial Court on September 21, 1978, together with briefs for the appellant and appellee.)

Defendant's answer to complaint and motion to amend defendant's answer were docketed in the Superior Court on November 15, 1976, and January 8, 1978, respectively (App. 1a), and consisted in substance of varying admissions and denials, including a denial of all of ¶ 9 of the complaint in which the petitioner had alleged that he had been serving "during a probationary period" at the time of his dismissal. The answer also denied the factual and constitutional due process infirmities specifically alleged in ¶¶ 12, 18, 19 and 21 of the complaint (App. 18a-20a, 21a).

Respondent's Rule 56(b) motion for summary judgment and supporting affidavit were docketed on February 6, 1978 (App. 2a, 22a-23a). The affidavit was dated February 3, 1978, and signed by the City Auditor, not the respondent Mayor (see App. 23a).

After reciting that there is "no genuine issue as to any material fact, and that the plaintiff [*sic*] is entitled to judgment as a matter of law," the affidavit recited in the entirety of its remainder:

> "Police Officer Robert W. Mace was terminated on April 13, 1976 from his employment with the City of Newburyport, Police Department. He was at that time serving in his probationary period under the Civil Service Regulations governed by MGL, Ch. 31, sec. 20D.
>
> "Signed under the pains and penalties of perjury . . . [etc.]" (App. 23a.)

Thus, the affidavit offered for the respondent merely repeated two and only two of the allegations in the petitioner's complaint. The affidavit did not address any of the plaintiff's other issues joined by the defendant's answer to the complaint and motion to amend defendant's answer filed prior to the filing of the Rule 56(b) motion and affidavit. No counter-affidavit was filed on behalf of the petitioner. It is argued below that none was necessary.

On February 6, 1978, the motion was marked for hearing on February 13 (App. 2a), when it was allowed following the hearing. No memorandum of the trial justice was docketed (App. 2a).

Timely appellate procedures were followed and briefs and a record appendix submitted to the Massachusetts Appeals Court. The case was transferred sua sponte to the Supreme Judicial Court of the Commonwealth and entered there on September 27, 1978 (App. 24a). It was argued on November 14, 1978; entry of judgment, "Judgment affirmed," unaccompanied by any other writing, was made on November 24, 1978, and rehearing denied December 15, 1978 (App. 24a, 25a).

By inference it appears that both Massachusetts courts decided that, no countervailing affidavit of the petitioner having been filed, summary judgment for the respondent was mandated by law, despite:

(1) the obvious failure of the affidavit to meet the numerous allegations of the complaint, including perjury, adequacy of notice of dismissal based upon perjury, and infirmities of con-

stitutional magnitude in both the dismissal notice and the voluntary hearing, thus leaving for trial multiple genuine issues of material fact that had already been joined by the answer to the complaint and its amendments;

(2) the fact that the affidavit merely recited two facts that in substance had been alleged in the petitioner's complaint;

(3) the plain terms of the Commonwealth's Rules of Civil Procedure that summary judgment, to be "appropriate," requires that "the pleadings," etc., "show that there is no genuine issue as to any material fact" (Rule 56(c), (e)).

The brief for the appellant in the Supreme Judicial Court squarely raised on pages 7, 8 and 9 (reproduced in the appendix at App. 26a-29a) both substantive and procedural due process issues asserted in the Superior Court by the paragraphs of the complaint set forth above. It thus appears that the Massachusetts Supreme Judicial Court decided that, inasmuch as the petitioner had been subject to summary discharge after notice of detailed reasons pursuant to G.L. c. 31, § 20D, he was therefore not entitled to litigate the remaining issues of whether the dismissal notice of April 13, 1976, and the hearing of April 8, 1976, comported with the standards mandated by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Reasons for Granting the Writ.

I. Introduction.

This case may well be one of first impression, at least as to some or all of its following aspects:

(1) The hearing voluntarily afforded by the respondent on the charges against the petitioner clearly was alleged in the

complaint to be, procedurally, a due process shambles, and that allegation, like all others in the complaint, is conclusive for purposes of Rule 56(b) summary judgment disposition.

(2) The notice of dismissal containing in detail the reasons therefor as mandated by the state statute incorporated evidence also alleged in the complaint to be perjurious, a factual foundation obviously neither contemplated by nor within the reach of any constitutional statutory scheme of the Great and General Court of the Commonwealth of Massachusetts regardless of purpose, let alone one intended to afford reasons for dismissal of permanent probationary police officers from the civil service.

(3) The equitable relief prayed for in the complaint, seeking judicial determinations on the lawfulness of the findings and decision of the respondent, reversal thereof, and various related orders, was a remedy appropriate and available to the petitioner under the statutes, case law, and Rules of Civil Procedure of the Commonwealth. Disposition of the case by way of Rule 56(b) clearly affected the petitioner's rights, both procedural and substantive, within the Due Process Clause of the Fourteenth Amendment.

(4) The complaint clearly invoked the protections of the Due Process Clause of the Fourteenth Amendment, and the "liberty" and "property" aspects of that Clause unmistakably were invoked by the brief for the plaintiff-appellant in the Supreme Judicial Court, and opposed there by the respondent's brief for defendant-appellee.

Governmental entities at the state and municipal level too abundant for enumeration here have enacted statutes and ordinances analogous to G.L. c. 31, § 20D, providing for termination of probationary civil service employment forthwith upon service of notice of detailed reasons for dismissal.

In recent years the several States have increasingly adopted the Federal Rules of Civil Procedure as the rules for their own

trial courts. On July 1, 1974, Massachusetts did so, verbatim from the Federal model, with few changes. Furthermore, that State and others have looked to this Court and the lower federal courts for constitutional interpretations and guidance in the application of those rules.

Obviously, this petitioner's interests in his professional reputation and career would have been better served had the respondent not afforded any hearing for the perjured testimony but merely provided the petitioner with the dismissal notice. Presumably, the respondent could not have interposed thereafter in a judicial proceeding the apparently successful claim by way of an affidavit that the petitioner, a probationary employee, inferentially was not entitled to a hearing in any circumstances (the contrary position will be addressed below). However, the Rule 56(b) disposition could not have addressed the question whether the petitioner was entitled to litigate the allegation of the perjurious basis of the dismissal notice (Complaint, ¶¶ 17, 21, App. 6a, 21a) because those allegations were not addressed by the affidavit supporting the Rule 56(b) motion, and since they had to be taken as true unless contradicted, they remained genuine issues of fact for trial. Indeed, they had been properly joined by way of denial in the respondent's answer filed on November 15, 1976 (App. 1a, 18a-20a), before he filed his Rule 56(b) motion on February 6, 1978 (App. 2a, 22a). A review of the documents indicates that there remained rather prominent in the case unresolved genuine issues of material fact and that the moving party's position was far from secured as a matter of constitutional law.

Accordingly, the unusual facts of this case provide a clear opportunity for this Court to deal with some or all of the following propositions:

(1) Hearings voluntarily afforded by the public authority to complainants to ventilate misconduct allegations against probationary police officers must observe rudimentary principles of procedural due process, including attendance thereat by the officer and the right of confrontation and cross-examination of adverse witnesses, where one result of the hearing might be the officer's forthwith dismissal from employment.

(2) Whether such hearings are to be afforded or not, subsequent summary notices of dismissal required to be factual pursuant to an otherwise constitutional statutory scheme may not have such a heinous, contemptible, and unlawful foundation as perjury.

(3) Summary and complete dispositions by a State of appropriate judicial remedies pursued by public employees may not be based upon the invocation of a state statute in a manner that does not address well-pleaded allegations of denial of rights secured by the Due Process Clause of the Fourteenth Amendment.

This Court repeatedly has characterized the local police officer as the single most prominently visible symbol of law and democratic government. Indeed, it may fairly be said that his claimed powers constitutionally to serve those interests have been given generous and often favorable consideration by this Court in recent years.

The facts of this case have ominous implications for the performance of official duties by all local law enforcement officers and other public servants in probationary status that are well beyond the private calamity visited upon the professional and personal capabilities of this petitioner to pursue his chosen profession in service to the interests of the community he swore to protect. All that he seeks here is an opportunity to prove in the courts of his own Commonwealth that he did not violate that oath. He should have it.

II. The Rulings Below have Foreclosed the Petitioner from Judicial Review of Properly Joined, Genuine Constitutional Issues of Substantive and Procedural Due Process.

A. *Substantive Due Process Issues.*

In affirming the trial court's judgment, the Supreme Judicial Court foreclosed the petitioner from litigating his substantive interests in "liberty" or "property" or both, as the same are protected by the Due Process Clause of the Fourteenth Amendment.

The substantive due process "liberty" interest of federal civil service employees in not being wrongfully stigmatized by untrue and unsupported administrative charges was recognized by this Court in *Arnett* v. *Kennedy*, 416 U.S. 134, 156-158 (1974).

That case extended through the Fifth Amendment a similar interest of state employees earlier recognized in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). *Roth* described a Fourteenth Amendment substantive due process "liberty" interest of a state university employee as to any action by the State that imposed charges against him or a stigma or disability that foreclosed his freedom to take advantage of other employment opportunities. *Id.* at 569-579.

Arnett, in ruling in effect that on its facts there was no necessity for a trial-type pre-removal hearing, went on to assert that the federal employee's cognizable "liberty" interest was adequately protected by a discretionary evidentiary hearing provided by administrative regulation to occur *post-removal*, a clear indication that the "liberty" interest of the Fifth Amendment is not constitutionally extinguished by termination of employment. Arguably, since *Arnett* relied so heavily on *Roth*, the "liberty" interest protected by the Fourteenth Amendment also survives state or local employment termination, a matter not dealt with by the lower court's judgment

against this petitioner, who cited *Roth* at p. 8 of his brief there (App. 28a).

This Court's *Roth* decision presumed that inasmuch as the employee "simply [was] not rehired" he remained as free as before to seek other professional employment. *Id.* at 575. This petitioner argued in his brief below that the facts were otherwise for him, asserting on p. 7 (App. 27a) that if the accusation of professional misconduct went unchallenged in the courts, it could "seriously impair his right to secure other employment, more especially in the law enforcement field," an allegation that he presently is foreclosed from proving at trial because of the incorrect application of summary judgment to his complaint (see part III, below).

The petitioner's self-evident "liberty" interest was in avoiding professional stigmatization, particularly one based upon perjury, to his chosen career. This Court ruled in *Bishop* v. *Wood*, 426 U.S. 341 (1976), that a false dismissal explanation privately communicated post-termination to a former police officer by his former superior reflected at worst upon the correctness of the superior's decision and his prudence, not upon the officer. Thus his claim of a constitutionally protected "liberty" interest was neither enhanced nor diminished.

The respondent herein relied upon that case in his brief for the defendant-appellee before the Supreme Judicial Court, asserting that the claim in *Bishop* under a 42 U.S.C. § 1983 action for back pay rested upon a "property *and* liberty interest theory" (emphasis supplied) (App. 32a), thus rewriting both *Bishop* and the disjunctive language of the Due Process Clause itself. He then went on, at p. 5, to assert that in *Bishop* this Court "held the claimed right or interest must be created under state law and that [this Court] would defer to state statutes and case law" (App. 32).

Bishop holds that a "property" interest in the expectation of continued employment must be guaranteed under state law to be so cognizable by the Fourteenth Amendment as to trigger

the procedural protections of the Due Process Clause. Presumably, such a guarantee is subject to proof at trial, like any other claim.

Bishop does not hold that the expectation of continued employment is the only protected "property" interest, nor does it hold that a "liberty" interest in reputation is subject to destruction by perjury either voiced during an uncontestable hearing convened by the public authority or incorporated within a summary dismissal notice actually serving to terminate publicly regulated employment.

The language of *Paul* v. *Davis*, 424 U.S. 693 (1976), imports that a "property" interest in an intangible such as reputation is cognizable by the procedural protections of the Due Process Clause when conjoined with a tangible interest such as employment. That language quotes extensively from earlier language in *Roth*, *supra*, such as "declining to rehire" and "to reemploy the respondent." *Id.* at 709. *Paul* goes on to hold that, as to the damage to reputation, "the defamation had to occur in the course of the termination of employment." *Id.* at 710. *Paul* also correctly speaks in the disjunctive of the protected interests, i.e., "either 'liberty' or 'property' as meant in the Due Process Clause." *Id.* at 710.

The law of Massachusetts has recognized an actionable "property" interest in personal and professional reputations alike for generations. *Chaddock* v. *Briggs*, 13 Mass. 248, 7 Am. Dec. 137 (1816). Since determination of the protected "property" interest in expectation of continued employment is to be had by reference to substantive state law, *Bishop* v. *Wood*, *supra*, then it is also constitutionally permissible to reference the state law for a protected "property" interest in professional or personal reputation, in addition to the recognized "liberty" interest that actuates due process protections against professional stigmatization.

In other words, it may be reasonably said that the facts of this petitioner's case not only give rise to a protected "liberty"

interest but also may well merge with the underlying state law of defamation so as to create a parallel "property" interest guaranteed by state law, subject to proof, quite apart from a "property" interest in expectation of continued employment. Stated yet another way, the facts alleged within the petitioner's complaint in the Superior Court, taken as true for purposes of summary judgment, raise both "liberty" and "property" interests as defined by this Court, so as to trigger the procedural provisions of the Due Process Clause of the Fourteenth Amendment. *Bishop* v. *Wood*, *supra*. *Paul* v. *Davis*, *supra*.

The Superior Court docket entries (App. 1a-2a) show that the petitioner's complaint was filed on October 13, 1976, six months to the day from the date of the respondent's notice of dismissal. Obviously, a timely action had to be filed, but it cannot be inferred from these facts that the time frame of the litigation initiated by the petitioner elicited for himself any unfavorable publicity concerning his dismissal other than would be within the exclusive control of the media or precipitated six months earlier by the respondent's action in dismissing him. As will be seen below, the petitioner's later litigation invoked the only judicial mechanism available to him under Massachusetts statute and case law.

B. *Procedural Due Process Issues.*

This petitioner as a probationary regular police officer in the Commonwealth reasonably could not have perceived his nine months probationary appointment status to have provided a "property" interest expectation in continued salaried employment, or an employment interest other than an opportunity to convert his appointment to a permanent career. He did have, however, a constitutional right, given his other "liberty" and "property" interests, *supra*, to procedural due process. It is settled law that any proceedings involving his conduct and reputation so as to affect his professional status

(and its accompanying reputation) must be permeated with fairness in its beginning, intermediate, and concluding steps. *Morgan* v. *United States*, 304 U.S. 1, 18-19 (1938), cited for Fourteenth Amendment purposes in *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96, 105 (1963).

The same concept has been restated by the Commonwealth's own courts somewhat differently in *Powers* v. *District Court of Southern Essex*, 2 Mass. App. Ct. 816, 309 N.E. 2d 889 (1974), holding that the requirements of *substantial* justice must be observed in proceedings for the discharge of persons in the classified civil service.

It is not argued here that the petitioner held a subjective expectancy of a regular permanent appointment or, if he did, that standing alone it should be protected by *procedural* due process. Nonetheless, it is postulated that his allegation of perjurious evidence contained within both the hearing voluntarily afforded to his accusers but denied to him and the subsequent notice of dismissal was well-founded on an established and widely perceived public policy of the United States and the Commonwealth first enunciated centuries ago: thou shalt not bear false witness.

That is not merely "a *de facto* policy related to tenure," *Perry* v. *Sindermann*, 408 U.S. 593 (1972). It is also the public understanding of a law promulgated throughout the nation to prohibit perjury and fostered by punishment for felony. An otherwise constitutionally valid civil service tenure policy cannot be so applied as to deny a litigant the opportunity to prove such basic illegitimacy in the reasons for his dismissal from public employment, and procedural due process may not legitimately be denied under those circumstances. *Perry, supra*, at 599-603.

Constitutional principles do not require a hearing in every conceivable case of governmental impact on a private interest. *Stanley* v. *Illinois*, 405 U.S. 645 (1972). However, just as the appropriate limits on the *substantive* due process rights that

activate *procedural* due process come not from drawing arbitrary lines but from careful respect for the teachings of history and a solid recognition of the basic values of our society, *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977), a *procedural* rule that may satisfy due process in one context may not necessarily satisfy it in another. *Bell* v. *Burson*, 402 U.S. 535 (1971).

Due process is a flexible concept that calls for such procedural safeguards as the particular situation demands, *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), and it is not a technical conception with fixed content unrelated to time, place and circumstances. Rather, it is flexible and calls for such *procedural* protections as the particular situation demands. *Mathews* v. *Eldridge*, 424 U.S. 319 (1976).

A governmental hearing excluding the target of misconduct charges and resulting in employment termination is no hearing at all. A public employment dismissal notice that itself is founded upon the commission of a crime is not a governmental mechanism permissible under the Supreme Law of the Land.

This petitioner's state court claim of a constitutional right to litigate the stated reasons for his dismissal, based upon well-pleaded allegations of perjury that must be taken as true for purposes of summary judgment disposition, is supported by settled constitutional principle: that a state cannot exclude a person "from *any* . . . occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238-239 (1957) (emphasis supplied).

III. The Rulings Below are in Conflict With the Plain Terms of Rule 56 of the Rules of Civil Procedure of the Commonwealth of Massachusetts and With the Decisions of This Court Establishing the Constitutional Standards to be Applied Thereto.

At the time of the petitioner's discharge from his probationary status there was no provision within Massachusetts'

civil service statutory scheme for review by the state Civil Service Commission of probationary dismissals. However, direct judicial review is available nonetheless under G.L. c. 231A, § 1, providing for declaratory relief, *Canney* v. *Municipal Court of the City of Boston*, 368 Mass. 648, 335 N.E. 2d 651 (1975), and by the terms of Massachusetts Rules of Civil Procedure, Rule 57, that procedure "shall be in accordance with these rules . . .." *Canney supra*, 368 Mass. at 655. Thus, the petitioner's complaint was both substantively and procedurally pursued correctly under the existing state statutes and case law.

This Court has addressed the question of state procedural actions affecting Fourteenth Amendment due process rights in unmistakable language. It has held that the identification of the specific dictates of due process generally requires consideration of three factors:

> (1) the private interests affected by the state action;
> (2) the risk of erroneous deprivation of such interests through the procedures used and the probable value if any of additional or substituted procedural safeguards; and
> (3) the governmental interests, including the function involved and the fiscal and administrative burden that additional or substituted procedural requirements would entail. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

At the time the Massachusetts courts applied Rule 56(b) to this petitioner's complaint the Rule was identical in its wording with Rule 56 of the Federal Rules of Civil Procedure. (See Massachusetts Rule 56, reproduced in the Appendix hereto at App. 43a-45a).

It is axiomatic that Rule 56 is not a mere technical procedure, but that it affects substantive rights of litigants. *Hoffman* v. *Babbitt Bros. Trading Co.*, 203 F. 2d 636, 637 and n. 1 (9th Cir. 1953), inasmuch as it operates as res judicata, *State of Oregon* v. *United States*, 195 F. Supp. 276, 277-278 (D. Ore. 1961), affirmed on other grounds, 308 F. 2d 568 (9th Cir. 1962), cert. den. 372 U.S. 941 (1963), thus going to the merits of the action. *Hoke* v. *Retail Credit Corp.*, 521 F. 2d 1079, 1081 n. 3 (4th Cir. 1975), cert. den. 423 U.S. 1087 (1976). Since the Rule may not be used to deprive a litigant of a full trial of genuine fact issues, it must be "cautiously invoked" so that no person will be *improperly deprived of a trial of disputed factual issues*. *Associated Press* v. *United States*, 326 U.S. 1, 6 (1945). Under Rule 56 a court may only determine whether there are issues to be tried; it is not empowered to make a determination of those issues. *Hoffman* v. *Babbitt Bros. Trading Co.*, *supra*.

The plain terms of the Massachusetts Rule require the trial court to make its determination based upon a review of "the pleadings [and] . . . the affidavits, if any . . ." and that these documents must show "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ." (See Mass. R. Civ. P., Rule 56(c), App. 43a-44a.)

According to this Court, such an evaluation "must be viewed in the light most favorable to the [adverse] party" on inferences to be drawn from the underlying facts, *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962), including the allegations in his complaint. *Bishop* v. *Wood*, *supra*.

Inasmuch as the petitioner filed no opposing affidavit, the next question is whether his claim for relief founders on that fact. Since the lower court had to review the entire record, including the pleadings, the issue may be resolved by reference to the allegations of the complaint and the affidavit in support of the Rule 56 motion that must dispose of *all* the well-pleaded issues. If that affidavit leaves unresolved one or more genuine

issues of material fact, then summary judgment by the standards of this Court must be resolved in favor of the petitioner. *Associated Press* v. *United States*, *supra*.

The affidavit (App. 22a-23a) recited only two facts:

> (1) that the petitioner had been dismissed on April 13, 1976 and
>
> (2) that on that date he was within his probationary employment term as defined by state statute.

Both of those facts having been set forth in the petitioner's complaint (see App. 3a, 4a), the affidavit amounted in effect to a stipulation reversing the respondent's *denial* of those two facts in his answer to the complaint (App. 18a-20a) filed *prior to* his Rule 56 motion (see docket entries, App. 1a-2a).

Reduced to its barest terms, the issue then is whether the affidavit, which amounted in effect to a stipulation, was dispositive of all the issues raised in the complaint. If a stipulation, whether by way of affidavit or otherwise, either equivocates or leaves a genuine issue of material fact in dispute, then it is undispositive and summary judgment must be denied. *Williams* v. *Chick*, 373 F. 2d 330, 331 (8th Cir. 1967). The affidavit relied upon by the respondent did not address any of the well-pleaded facts that raised issues of constitutional dimensions in this case, including those of insufficiency of the notice of dismissal detailing false and perjurious facts, and the denial of full access by the petitioner to the hearing voluntarily afforded to the charges of professional misconduct that resulted in his dismissal.

"Rule 56(e) states that a defense is required only if the motion for summary judgment is 'supported as provided in this rule' and that even if the opposing party fails to submit counter-evidence, summary judgment shall be entered only 'if

appropriate.'" Wright & Miller, *Federal Practice and Procedure: Civil* (1973), § 2739, at p. 716. The authors go on to quote the Advisory Committee Note as follows: "Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied *even if no opposing evidentiary matter is presented*" (emphasis added by Wright & Miller), pp. 716-717; this language is also quoted in *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 159-160 (1970); *Mourning* v. *Family Pub. Serv., Inc.*, 411 U.S. 356, 382-383 (1973) (Douglas, J., dissenting in part). *Adickes* also stands for the proposition that inferences drawn from the facts contained in the moving party's materials must be viewed in the light most favorable to the adverse party. *Adickes*, *supra*, at 158-159. See also *Stubbs* v. *United States*, 428 F. 2d 885 (9th Cir. 1970), cert. den. 400 U.S. 1009 (1971).

This Court has also held that summary judgment may not be "appropriate" within the meaning of Rule 56(e) in cases involving complicated public issues and constitutional questions. *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256-257 (1948). *Askew* v. *Hargrave*, 401 U.S. 476, 478-479 (1971).

Before summary judgment will be granted, this Court has ruled that it mst be clear what the truth is, *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467, 472-473 (1962); *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944), and *any doubt* as to the existence of a genuine issue of material fact will be resolved against the movant. *Adickes*, *supra*. This petitioner's well-pleaded allegations of perjury and constitutional infirmities, being entirely unaddressed by the affidavit in support of the Rule 56 disposition, left unresolved multiple genuine issues of material fact *and law*. Accordingly, entry of summary judgment was not "appropriate" as required by the Rule and the Due Process Clause of the Fourteenth Amendment.

This Court has determined that both liberty and property are specifically protected by the Fourteenth Amendment

against *any* state deprivation which does not meet constitutional standards of due process and that such protection may not be avoided by the simple label that a State chooses to fasten upon its conduct or its statute. *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402 (1966).

Conclusion.

The City of Newburyport denied this petitioner the protections of the Due Process Clause of the Fourteenth Amendment in the first instance by excluding him from full participation in the hearing of professional misconduct charges against him, and again by notice of termination of his professional employment stating detailed reasons that in fact were founded in perjury. The Commonwealth of Massachusetts then denied him due process for a third time by the erroneous application of summary judgment based upon an affidavit citing a state civil service statute wholly irrelevant to his invocations of the Due Process Clause of the Fourteenth Amendment, foreclosing yet again the opportunity he sought and still seeks to confront and cross-examine "those whose words" deprived him of his professional livelihood. *Willner* v. *Committee on Character and Fitness*, *supra*, 373 U.S. at 103.

Accordingly, a writ of certiorari should be issued to the Supreme Judicial Court of Massachusetts and its judgment should be reversed.

Respectfully submitted,

FRANCIS J. O'ROURKE,
75 Federal Street, Suite 600,
Boston, Massachusetts 02110.
(617) 542-0896
Counsel for Petitioner.

Of Counsel:
BRICKLEY, SEARS & COLE,
75 Federal Street, Suite 600,
Boston, Massachusetts 02110.
(617) 542-0896

Appendix.

TABLE OF CONTENTS.

Essex Superior Court No. 6599

Docket entries 1a
Complaint 2a
Exhibit A 8a
Exhibit B 11a
Exhibit C 12a
Exhibit D 17a
Defendant's answer to complaint 18a
Motion to amend plaintiff's complaint 21a
Motion to amend defendant's answer 21a
Defendant's motion for summary judgment 22a
Affidavit in support of motion for summary judgment 22a
Summary judgment 23a

Supreme Judicial Court No. 1597

Docket entries 24a
Judgment 25a
Brief for plaintiff-appellant (designated portion) 26a
Brief for defendant-appellee (designated portion) 30a

General Laws, chapter 31
§ 20D 33a
§ 43 35a
§ 46A 41a
General Laws, chapter 231A, § 1 42a
Massachusetts Rules of Civil Procedure, Rule 56 43a

COMMONWEALTH OF MASSACHUSETTS.

Superior Court.

ESSEX, ss. No. 6599

ROBERT W. MACE

v.

BYRON J. MATTHEWS

Docket Entries.

1976	
October	
13	1 Complaint
20	2 Plff's. jury claim
November	
4	3 Return of service
15	4 Deft's. answer
16	5 Plff's. waiver of jury claim, assented to
1977	
November	
7	6 Plff's motion for speedy trial Motion #6 allowed. Case advanced to December jury-waived list. DeGuglielmo, J.

1978		
January		
5	7	Plff's. motion to amend complaint
	8	Plff's suggestion of expiration of term of deft. and motion to substitute successor as party deft.
8	9	Deft's. motion to amend answer as on file
February		
6	10	Motion for summary judgment
	11	Marking of affidavit on motion #10 for support of motion
	12	Affidavit of notice on motion #10 for February 13, 1978
13		Motion #10 allowed; Banks, D.C.J.
	13	Summary judgment for deft.; Banks, D.C.J.
28	14	Plff's. notice of appeal — parties notified

COMMONWEALTH OF MASSACHUSETTS.

Superior Court.

[Title omitted in printing.]

Complaint.

Now comes the plaintiff, by and through his attorneys, Randazzo and Randazzo, and represents as follows:

1. The plaintiff, a resident of the City of Newburyport, in the County of Essex, and Commonwealth of Massachusetts, was duly appointed a provisional police officer for the City of Newburyport on December 5, 1974 and served continuously as such until November 24, 1975, at which time he was appointed a permanent full-time patrolman.

2. The defendant is the duly-elected mayor of the City of Newburyport and the appointing authority for the Newburyport Police Department.

3. That the plaintiff served continuously as a permanent full-time patrolman from November 24, 1975 to April 13, 1976 when, by decision of the defendant contained in a letter dated April 13, 1976, a copy of which is hereto attached and marked "A", the plaintiff was discharged on the grounds that he had been found guilty by the defendant of mishandling and abusing a person in protective custody, of misconduct while on duty as a police officer and of employing excessive force against the person in protective custody.

4. That the incident out of which the charges against the plaintiff arose occurred on March 7, 1976, at which time the plaintiff had been assigned by his superior to investigate a report that a person had assaulted members of his family and had threatened the life of his wife with a knife.

5. That the plaintiff had no knowledge nor was he advised officially or unofficially of any charges levied against him until receipt by the plaintiff of a communication from the defendant dated April 1, 1976, a copy of which is hereto attached and marked "B", alleging that the plaintiff employed excessive force upon and was otherwise guilty of misconduct and abusive to one Russell A. Janvrin, and giving notice to the plaintiff of a hearing to be held by the defendant on April 8, 1976.

6. That the communication dated April 1, 1976 and marked exhibit "B" was insufficient as a matter of law to adequately inform the plaintiff of the charges being levied against him and did not afford him sufficient information on which to prepare an adequate defense.

7. That the duly adopted Rules and Regulations of the Police Department of the City of Newburyport, a copy of which are hereto attached and marked "C", provide as follows:

"CITY MARSHAL

"A. *SUMMARY*: The City Marshal is the chief administrative officer of the department and the final departmental authority in all matters of policy, operations, and discipline. He exercises all lawful powers of his office and issues such lawful orders as are necessary to assure the effective performance of the department.

"B. *DUTIES AND RESPONSIBILITIES*: It is the duty and responsibility of the City Marshal to:

"1. k. Initiate investigation into all cases of alleged or apparent misconduct by department personnel."

8. That the respondent, in violation of the Rules and Regulations of the police department aforesaid, initiated an investigation independent of the procedures prescribed, and, without report or recommendation of the plaintiff's superiors, discharged the plaintiff.

9. That the plaintiff, even though serving as a permanent full-time police officer during a probationary period, was a duly-appointed police officer within the meaning of Section I, A. DEFINITIONS, of the Rules and Regulations of the Police Department. (See exhibit "C".)

10. That as a "duly appointed police officer", the plaintiff could not be discharged except for "just cause", as provided for in Section F. DISCIPLINARY ACTIONS, 3. Dismissal. (See exhibit "C".)

11. That as a member of the police department, the plaintiff was entitled to a written statement of the specific reason or reasons for his dismissal, as provided in Section F. 3. (See exhibit "C".)

12. That under the provisions of Section F. 3. (see exhibit "C"), and under the provisions of the Fourteenth Amendment to the Constitution of the United States, affording each citizen due process, the plaintiff was not given a full hearing, for the reason that the plaintiff was excluded from the hearing room on the order of the defendant while witnesses were examined.

13. That the defendant did not give to the plaintiff, as a duly-appointed member of the police department, written notice of his decision within two (2) days of the completion of the hearing, as required by Section F. 3. (see exhibit "C"), the hearing before the defendant having been completed on April 8, 1976 and notice given to the plaintiff on April 13, 1976. (See exhibits "A" and "B".)

14. That the defendant did not state to the plaintiff, as a duly-appointed member of the police department, fully and specifically the reasons for the plaintiff's dismissal, as provided by Section F. 3. (See exhibit "C".)

15. That the defendant did not give written notice to the plaintiff as a permanent full-time police officer, who had not completed nine (9) months' service, a detailed statement of the particulars wherein the conduct or capacity or character or quality of his work was not satisfactory, as required by General Laws (Ter. Ed.), Chapter 31, Section 20D, as amended, a copy of which is hereto attached and marked exhibit "D".

16. That the defendant did not, at the same time that written notice of dismissal was given to the plaintiff, send a copy of said notice to the Administrator, as required by G.L. (Ter. Ed.), Chapter 31, Section 20D, as amended (see exhibit "D"), in default of which the plaintiff became a permanent on

August 24, 1976 on the expiration of nine (9) months from the date of his certification on November 24, 1975. (See exhibit "D".)

17. That the decision of the defendant in dismissing the plaintiff was based on perjured testimony given at the hearing before the defendant on April 8, 1976 and procured by Russell A. Janvrin by coercion, intimidation and threat of bodily injury practiced upon the witnesses.

18. That the evidence which formed the basis of the findings, conclusions and action of the defendant in dismissing the plaintiff were, as a matter of law, insufficient to warrant such findings, conclusions and action.

19. That the dismissal of the plaintiff was arbitrary, capricious, unjust, unsupported by substantial evidence, and in violation of rights guaranteed to the plaintiff, under the due process provisions of the Constitution of the Commonwealth of Massachusetts of the Constitution of the United States.

20. That the plaintiff has no other or adequate remedy at law.

WHEREFORE, your plaintiff prays:

1. That the defendant be ordered to certify to this Honorable Court the records of the proceedings, including reports of any investigation conducted by any officer of the Newburyport Police Department, whether conducted at the order of the defendant, or pursuant to the provisions of the Rules and Regulations of the Police Department, and including a transcript of the evidence heard by the defendant, to the end that any errors of law may be determined and corrected by this Court, and to enable the Court to determine whether the finding and decision of the defendant were warranted as a matter of law upon the evidence before him.

2. That the finding and decision of the defendant may be quashed and reversed.

AND IN THE ALTERNATIVE:

3. That the defendant be ordered to reinstate the plaintiff as a full-time permanent police officer of the City of Newburyport.

4. That the defendant be ordered to sign vouchers or other necessary papers authorizing the City Treasurer to pay to the plaintiff any compensation to which he may be legally entitled.

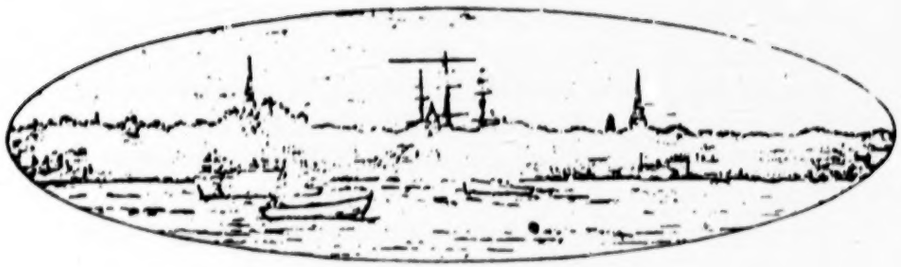
5. For such other and further relief as to the Court seems meet and proper.

By his Attorneys,

/s/ ANTHONY J. RANDAZZO
Randazzo and Randazzo
11 Lawrence St.
Lawrence, MA 01840
Tel. (617) 683-9595

October 13, 1976

EXHIBIT A.



City of Newburyport
Massachusetts

Byron J. Matthews
Mayor

April 13, 1976

RUSSELL A. JANVRIN, Complainant
VS:
DAVID FOLEY, ROBERT MACE, JOHN BLONDA
AND JOHN J. LEARY, Respondents

Decision.

This matter arose as the result of a written complaint dated March 9, 1976, signed under oath by Russell A. Janvrin of 48 Park Circle, Newburyport, Massachusetts. Mr. Janvrin made certain allegations and charges against Respondents Foley, Mace, Blonda and Leary, all police officers of the City of Newburyport. Accordingly, a full civil service hearing was held by me as appointing authority for the City of Newburyport on April 8, 1976, pursuant to Chapter 31, section 43 of the General Laws of the Commonwealth of Massachusetts.

Officers Foley, Blonda and Leary are permanent police officers, and have completed the nine month probationary period prescribed by Civil Service Regulations. Officer Mace was appointed a permanent police officer on November 24, 1975, and, therefore, is still serving his nine month probationary period.

All Respondents received at least three days notice of the hearing, and copies of the Civil Service law, where applicable. By request of the parties, the hearings were closed to the public.

Complainant Janvrin was represented at the hearing by Attorney Harvey Beit of Newburyport. All respondents were represented at the hearing by Attorney David Downes of Boston. Each party was given the opportunity to testify, present exhibits, and cross-examine witnesses. The hearings were tape recorded, with the assent of the parties. Also in attendance at the hearing was Robert Jones, City Marshall, James Lagoulis, City Solicitor, and Officer Timothy Clancy, Police Union Steward.

In addition to the Complainant and the Respondents, other witnesses who testified at the hearing were:

Mrs. Russell Janvrin, wife of the Complainant; Ronald Nath, M.D.; Robert Hossack, Anna Jaques Hospital nurse, Mrs. Mary Malcolm, 46 Park Circle, Newburyport; and Francis Clark, Police Matron.

All witnesses were duly sworn, and testified under oath. The Complainant presented as Exhibits photographs which showed bruises on his face and legs; a bill and physician's report from Anna Jaques Hospital; and a dented metal cigarette lighter. The Respondents introduced as Exhibits an investigation report and a copy of the Police Department Policies and Procedures on the use of firearms.

After listening to the parties and witnesses, and examining their statements and exhibits, and after due deliberation, I find as follows:

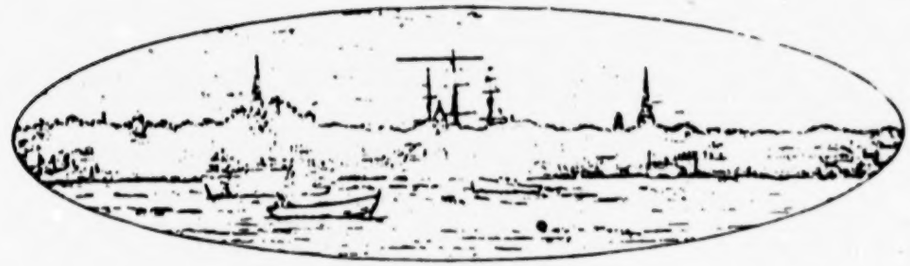
ROBERT W. MACE:

The charges against Officer Mace were that on March 7, 1976, while in the performance of his official duties as a Police Officer of the City of Newburyport, he used excessive force, was guilty of misconduct, and was abusive to Russell A. Janvrin, a person under protective custody at the Newburyport Police Station.

On the charges of using excessive force and being abusive to Mr. Janvrin, I find that Officer Mace did mishandle the Complainant while he was being placed under protective custody at the Newburyport Police Station. I further find that Officer Mace's behavior, under all of the circumstances of the situation in question, constituted misconduct for a Police Officer while on duty. Therefore, I find Officer Mace guilty on all charges, and order that he be permanently removed from the Police Force of the City of Newburyport, effective immediately. I further order Officer Mace to turn in all of his departmental equipment, including his service revolver and badge, to the City Marshall forthwith.

/s/ BYRON J. MATTHEWS,
Mayor

EXHIBIT B.



City of Newburyport
Massachusetts

Byron J. Matthews
Mayor

April 1, 1976

Mr. Robert W. Mace (probationary)
1 Park Circle
Newburyport, Massachusetts 01950

Dear Mr. Mace:

You are hereby notified that a hearing will be held:

Time: 10:30 A.M.
Date: Thursday, April 8, 1976
Place: Office of the Mayor, City Hall, Newburyport, Mass.

The specific reason for this hearing is to investigate charges that on March 7, 1976, while in the performance of your official duties as a Police Officer of the City of Newburyport,

you were guilty of using excessive force, and were otherwise guilty of misconduct and were abusive to one Russell A. Janvrin of 48 Park Circle, Newburyport, a person in protective custody.

You were appointed a permanent police on November 24, 1975. Therefore, under Civil Service regulations you are still on a probationary period and cannot be accorded the benefits of Chapter 31, Section 43 of the General Laws. However, as a courtesy to you I want to give you every opportunity to present your side of this matter.

You shall be allowed to answer the charges preferred against you either personally, or by counsel.

Very truly yours,

/s/ BYRON J. MATTHEWS, *Mayor*,
Appointing Authority, City of Newburyport

EXHIBIT C.

CITY MARSHAL

A. *SUMMARY*

The City Marshal is the chief administrative officer of the department and the final departmental authority in all matters of policy, operations, and discipline. He exercises all lawful powers of his office and issues such lawful orders as are necessary to assure the effective performance of the department.

Through the City Marshal the department is responsible for the enforcement of all laws and by-laws coming within its

legal jurisdiction. The City Marshal is responsible for planning, directing, coordinating, controlling and staffing all activities of the department, for its continued and efficient operation, for the enforcement of rules and regulations within the department, for the completion and forwarding of such reports as may be required by competent authority, and for the department's relations with local citizens, the local government and other related agencies.

B. *DUTIES AND RESPONSIBILITES*

It is the duty and responsibility of the City Marshal to:

1. *Supervision*

a. Observe and enforce all laws which the department or its officers have the authority to execute.

b. Organize, direct, and control all resources of the department for the most efficient discharge of his duty to preserve the peace, protect persons and property and obey and enforce all ordinances of the community and all criminal laws of the Commonwealth of Massachusetts and the United States of America.

c. Develop the organizational structure of the department in accordance with professional standards.

d. Establish a routine of daily duties to be performed by officers as designated by him and designate an officer to serve as Commanding Officer in his absence.

e. Assign, detail or transfer any member or employee of the department to or from any unit or assignment whenever he shall deem such action to be in the best interest of the efficiency, discipline or morale of the department.

f. Cause an adequate and progressive program of training to be organized and conducted for members and employees of the department.

g. Ensure that all members have available to them copies of the department's rules, regulations, and policies.

h. Promulgate all general and special orders of the department and issue on his own authority orders, written or oral, not inconsistent with his powers, duties and responsibilities.

i. Inspect and be responsible for the appearance of members of the department.

j. Plan and execute police programs designed to prevent and repress crime, to apprehend and prosecute offenders, to recover property, and to regulate non-criminal conduct. He shall modify these programs to meet current trends as they are referred to him by analyses of records and reports.

k. Initiate investigation into all cases of alleged or apparent misconduct by department personnel.

l. At all times inform himself of the affairs of the department and be assured that the duties and responsibilities of his subordinates are being properly discharged.

m. Exercise general supervision and inspection of all public places within the community and cause the laws and ordinances concerning them to be obeyed.

n. Develop or adopt new techniques to improve effectiveness in the discharge of primary police obligations of the department.

o. Enlist the suggestions of members and employees of the department to ensure maximum relevance and acceptance of all departmental rules, regulations, and policies and procedures.

p. Be responsible for the safekeeping of all criminal evidence and any recovered or "found" property brought to the station.

2. *Reporting and Notification*

a. Submit those reports required of him in such form and detail as to clearly depict conditions and police action taken.

b. Submit an annual report which presents the problems, services, and activities of the department.

c. Make an annual report to the State Department of Correction, indicating the number of arrests and their classification.

SECTION I. RULES AND ADMINISTRATIVE PROCEDURES

A. *DEFINITIONS*

Department	The Police Department.
City Marshal	City Marshal. The City Marshal is the commanding officer of the department. As the executive and administrative head, he is responsible to the Mayor for proper functioning and efficient management of the department.
Supervisor	Any rank above patrolman.
Officer-In-Charge	Commanding officer of a shift.
Senior Officer	A member in any given rank with the longest service in that rank.
Member	Duly appointed police officer in the department.
Employee	Civilian employee of the department.
Manual	Manual of Rules and Regulations of the department.
Orders	Commands or instructions, oral or written, given by one member to another member of lesser rank.
Police Incident	An occurrence or incident suggesting or requiring police action by members.
Shift	Eight hour tour of duty, unless otherwise ordered by the City Marshal.

F. *DISCIPLINARY ACTIONS*

Any member or employee violating his oath and trust by committng an offense punishable under the laws or statutes of the United States, the State of Massachusetts, or local ordinances or who violates any provisions of the Rules and Regulations Manual or procedures of this police department, or who disobeys any lawful order or who is deemed incompetent to perform his duties is subject to appropriate disciplinary or other official action as deemed necessary.

1. *Letters of Warning* — The City Marshal may issue letters of warning for minor infractions of departmental rules and regulations. All letters of warning will become a part of the personal file of the individuals involved.

2. *Suspension* — The Mayor, the City Marshal, or their subordinates to whom such authority has been delegated may suspend an officer up to five days for just cause. The provisions of the Massachusetts Civil Service Law (Chapter 31 Section 43e) govern this situation. An officer suspended under this section must, within twenty-four hours after the suspension receive a written notice stating the specific reason for the suspension and informing him of his right to a hearing before the Mayor. Such hearing must be requested in writing within forty-eight hours of the suspension, and must be held within five days of the receipt of such request (always excluding weekends and holidays). There is also an appeal to the Civil Service Commission from the Mayor's determination, and finally to the state's courts.

3. *Dismissal* — A member or employee of the department may be discharged by the Mayor for just cause. Again the Massachusetts Civil Service Law (Chapter 31 Section 43e) governs the procedure of dismissal. Before being dismissed, an officer or employee must be given a written statement of the specific reason or reasons, together with a copy of sections

forty-three, forty-four, and forty-six A. He must be given a full hearing before the Mayor, of which he must be given three days' written notice. Within two days after completion of the hearing, the Mayor must give the officer or employee a written notice of his decision, stating fully and specifically the reasons therefor. Anyone dismissed has a right to review of the case by the Civil Service Commission if he so requests within five days of receiving written notice from the Mayor. The determination of the Commission may likewise be reviewed by the state's courts.

EXHIBIT D.

§ 20D. [Probationary Period.]

Except as otherwise expressly provided in this chapter or in section thirty-six of chapter forty-eight, no person shall be regarded as holding office or employment on a full-time basis until he has been appointed to a permanent, full-time position in the official or labor service and has actually performed the duties of the office or position thereof for a probationary period of six months; provided, however, in the case of a person appointed as a regular police officer in any city or town, the metropolitan district police force, or the Massachusetts Bay Transportation Authority police force or as a capitol police officer, the probationary period shall be nine months. There shall be no increase in pay or change in the duties of any such office or position during such a period without the approval of the director. If any such increase in pay or change in duties is made during such a period without such approval, the director may cancel and declare void the certification under which the appointment was made, and thereupon the employment of the person so appointed shall cease.

If the conduct or capacity of a person serving a probationary period under an appointment in the official service or labor service, or the character or quality of the work performed by him, is not satisfactory to the appointing authority, he may, at any time after such person has served thirty days and prior to the end of such probationary period, give such person a written notice to that effect, stating in detail the particulars wherein his conduct or capacity or the character or quality of his work is not satisfactory, whereupon his service shall terminate. The appointing authority shall at the same time send a copy of such notice to the director. In default of such a notice, the appointment of such person shall become permanent upon the termination of such period; provided, however, that the director, with the approval of the commission, may establish procedures assuring the evaluation by appointing authorities of the performance of police officers during such probationary period.

COMMONWEALTH OF MASSACHUSETTS.

Superior Court.

[Title omitted in printing.]

Defendant's Answer to Complaint.

1. The defendant admits the allegations contained in paragraph (1) of the Complaint.

2. The defendant admits the allegations contained in paragraph (2) of the Complaint.

3. The defendant admits the allegations contained in paragraph (3) of the Complaint.

4. The defendant admits the allegations contained in paragraph (4) of the Complaint.

5. The defendant has no knowledge of and therefore neither admits nor denies the allegations contained in paragraph (5) of the Complaint.

6. The defendant denies the allegations contained in paragraph (6) of the Complaint and the defendant further asserts that the plaintiff was accorded notice and a full hearing on the charges brought against him even though the plaintiff was not entitled to such.

7. The defendant admits the allegations contained in paragraph (7) of the Complaint.

8. The defendant denies the allegations contained in paragraph (8) of the Complaint.

9. The defendant denies the allegations contained in paragraph (9) of the Complaint.

10. The defendant denies the allegations contained in paragraph (10) of the Complaint.

11. The defendant denies the allegation contained in paragraph (11) of the Complaint, but the defendant asserts that the plaintiff did receive a written statement of the specific reason or reasons for his dismissal, despite his lack of entitlement thereto.

12. The defendant denies the allegation contained in paragraph (12) of the Complaint, and further answering the defendant states that the plaintiff was given a full hearing at which the plaintiff was present during any and all testimony relating to him.

13. The defendant denies the allegation contained in paragraph (13) of the Complaint.

14. The defendant denies the allegation contained in paragraph (14) of the Complaint.

15. The defendant denies the allegation contained in paragraph (15) of the Complaint.

16. The defendant denies the allegation contained in paragraph (16) of the Complaint.

17. The defendant denies the allegation contained in paragraph (17) of the Complaint.

18. The defendant denies the allegation contained in paragraph (18) of the Complaint.

19. The defendant denies the allegation contained in paragraph (19) of the Complaint.

20. The defendant denies the allegation contained in paragraph (20) of the Complaint.

Respectfully submitted,

/s/ JAMES LAGOULIS,
City Solicitor, City of Newburyport.

COMMONWEALTH OF MASSACHUSETTS.

Superior Court.

[Title omitted in printing.]

Motion to Amend Plaintiff's Complaint.

21. That the decision of the Defendant, Mayor of the City of Newburyport was based on perjury committed by Russell A. Janvrin.

By his Attorneys,

/s/ ANTHONY J. RANDAZZO
Randazzo and Randazzo
11 Lawrence St.
Lawrence, MA 01840
Tel. (617) 683-9595

COMMONWEALTH OF MASSACHUSETTS.

Superior Court.

[Title omitted in printing.]

Motion to Amend Defendant's Answer.

21. That the defendant denies the allegation contained in paragraph (21) of the amended complaint.

Respectfully submitted,

/s/ RICHARD B. JONES,
City Solicitor, City of Newburyport.

COMMONWEALTH OF MASSACHUSETTS.

Superior Court.

[Title omitted in printing.]

Motion for Summary Judgment.

The defendant hereby moves the court to enter summary judgment for the defendant in accordance with the provisions of Rule 56(b) and (c) of the Rules of Civil Procedure, on the ground that the pleadings and affidavits hereto attached and marked Exhibit A show that there is no genuine issue of material fact and the defendant is entitled to judgment as a matter of law.

/s/ RICHARD B. JONES,
Attorney for Defendant
28 Green Street
Newburyport, Massachusetts
462-8365

Allowed (Banks, D.C.J.) February 13, 1978.

COMMONWEALTH OF MASSACHUSETTS.

Superior Court.

[Title omitted in printing.]

Affidavit in Support of Motion for Summary Judgment.

I am Nolan R. Morris, Jr. and have personal knowledge of the facts herein set forth.

This affidavit is submitted in support of the plaintiff's motion for summary judgment herein, for the purpose of showing that there is in this action no genuine issue as to any material fact, and that the plaintiff is entitled to judgment as a matter of law.

Police Officer Robert W. Mace was terminated on April 13, 1976 from his employment with the City of Newburyport, Police Department. He was at that time serving in his probationary period under the Civil Service Regulations governed by MGL, Ch. 31, sec. 20 D.

Signed under the pains and penalties of perjury on February 3, 1978.

/s/ NOLAN R. MORRIS, JR.,
Auditor, City of Newburyport.

COMMONWEALTH OF MASSACHUSETTS.

Superior Court.

[Title omitted in printing.]

Summary Judgment.

(Mass. R. Civ. P. 56)

This action came to be heard before the court, BANKS, D.C.J. presiding, upon the motion of the defendant for summary judgment pursuant to Mass. R. Civ. P. 56, the parties having been heard, the Court finds that there is no genuine issue as to material fact, and that the defendant is entitled to

a judgment as a matter of law, it is hereby ORDERED that: the complaint of plaintiff be and hereby is dismissed against defendant with costs.

Date: February 13, 1978 /s/ WILLIAM J. GREENLER, JR.,
Assistant Clerk.

COMMONWEALTH OF MASSACHUSETTS.

Supreme Judicial Court

FOR THE COMMONWEALTH.

No. 1597

ROBERT W. MACE
v.
BYRON W. MATTHEWS.

Docket Entries.

9/21/78 Transferred sua sponte from the Appeals Court
Transferred with case:
Appendix filed by Anthony J. Randazzo of Randazzo and Randazzo
Brief for the Appellant by Anthony J. Randazzo of Randazzo and Randazzo
Brief for the Appellee by Richard B. Jones
Entered September 27, 1978
Argued November 14, 1978 (CJ, Q, W, L)
November 24, 1978. Judgment affirmed.
Rescript November 24, 1978

Notice sent to counsel.
December 4, 1978. Plaintiff's Petition for Rehearing No. 140 filed.
December 15, 1978. Petition for Rehearing denied.

COMMONWEALTH OF MASSACHUSETTS.

Supreme Judicial Court

FOR THE COMMONWEALTH.

At Boston, November 24, 1978.

In the case No. SJC-1597

ROBERT W. MACE
vs.
MAYOR OF NEWBURYPORT

pending in the Superior Court for the County of Essex
No. 6599

Ordered, that the following entry be made in the docket; viz., — Judgment affirmed.

By the Court,

/s/ FREDERICK J. QUINLAN,
Clerk.

COMMONWEALTH OF MASSACHUSETTS

The Appeals Court

ESSEX COUNTY
No. A. C. 78-263

ROBERT W. MACE,
PLAINTIFF, APPELLANT,

v.

BYRON J. MATTHEWS,
DEFENDANT, APPELLEE.

ON APPEAL FROM A JUDGMENT AND ORDER
OF THE SUPERIOR COURT IN AND FOR
THE COUNTY OF ESSEX

BRIEF FOR APPELLANT

ANTHONY J. RANDAZZO
RANDAZZO & RANDAZZO
11 Lawrence Street
Lawrence, Massachusetts 01840
Tel. (617) 683-9595
Attorneys for Appellant

(d) That the plaintiff did not give to the defendant written notice of his decision within two days of the completion of the hearing, as required by the Rules and Regulations, the hearing having been completed April 8, 1976 and notice given to the plaintiff by letter dated April 13, 1976. (App. 5)

(3) The plaintiff is entitled to notice, hearing and judicial review of his discharge, where the discharge was predicated on conduct which attributed to the plaintiff the crime of assault and battery by reason of employment of excessive force against a person in protective custody.

Ryan vs. Marren
216 Mass. 556
104 N.E. 353, 354 (1914)

It is submitted that if this accusation were permitted to go unchallenged, it might seriously damage the reputation of the plaintiff and seriously impair his right to secure other employment, more especially in the law enforcement field.

Stetson vs. Board of Selectmen of
Carlisle, Mass.Adv.Sh.(1976) 502,
343 N.E. 2d 382, 386 (1976)

"When a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

City Regents of State Colleges vs. Roth, 408 U.S. 654, 33 L. Ed. 2d 548, 588 (1972)

(4) The due process requirements of notice and hearing would apply to the hearing voluntarily afforded by the defendant to the plaintiff, even where these rights contained in Chapter 31, Sections 43 and 46 were foreclosed to him by the provisions of Section 20D.

The Supreme Judicial Court, while rejecting attacks on the constitutionality of Chapter 31 for failure to provide notice, hearing, and judicial review under certain circumstances, has accepted for determination on the issue of due process, the sufficiency of any hearing voluntarily afforded.

Canney vs. Municipal Court of the City of Boston, 368 Mass. 648, 335 N.E. 2d 651, 655 (1977)

Therefore, the plaintiff's allegation that he was excluded from the hearing room on order of the defendant while witnesses were being examined (App. 5) constituted denial of due process by reason of lack of opportunity of confrontation and cross examination.

Willner vs. Committee on Character and Fitness 373 United States 96, 107 and 108 (1963)

Further, the decision of the defendant, based on the perjured testimony given by the complainant, Russell A. Janvrin, or procured by him from other witnesses by coercion, intimidation or threats of violence (App. 5), would not be a decision supported by substantial evidence, which a reasonable mind might accept as adequate to support the decision,

Interstate Busses Corporation vs. U. S. 259 Fed. Supp. 577, 579 (1966)

and the hearing out of which the decision arose would be lacking in the element of fair play, essential to due process.

Burns vs. Lovett 202 Fed. 2d 335

COMMONWEALTH OF MASSACHUSETTS.

APPEALS COURT.

No. 78-263.

ESSEX COUNTY.

ROBERT W. MACE,
PLAINTIFF-APPELLANT,

v.

BYRON J. MATTHEWS,
DEFENDANT-APPELLEE.

ON APPEAL FROM A JUDGMENT AND ORDER
OF THE SUPERIOR COURT.

Brief for the Defendant-Appellee.

RICHARD B. JONES,
City Solicitor,
28 Green Street,
Newburyport, Massachusetts 01950.
(617) 462-8365

[4]

that during the probationary period an appointee may be discharged without notice and opportunity to be heard.

The employee's claim of an incomplete and invalid notice is without merit as it was offered to him in the spirit of justice and fair play and was not statutorily mandated.

The employee claims that the hearing which was offered to him as a courtesy was inadequate. It was more than adequate due to the fact that counsel for the employee was present; he had an opportunity to speak and was heard; and the appointing authority was there with his counsel present.

Furthermore, there were tapes made for the record of all the proceedings and testimony at this hearing.

(6) Reasons for termination given by an appointing authority in a notice must be taken as final on the facts. In *Scott v. Manager State Airport, Hanscom Field,* 336 Mass. 372, 145 N.E. 2d 706 (1957), the court stated that reasons for termination given by an appointing authority in a notice must be taken as final on the facts. All the appointing authority must find is that the conduct or capacity of the appointee, or the character or quality of the work, is not satisfactory. The employee in his probationary period has no right to challenge or question the appointing authority's judgment or reasons. *Vigoda v. Barton,* 338 Mass. 302, 155 N.E. 2d 409 (1959) (A. 5-6).

(7) Constitutional law at present distinguishes between an infringement of a right, where one must have due process, and infringement of a privilege, where one is not protected under due process.

The most recent controlling case is *Bishop v. Wood,* 426 U.S. 341 (1976), in which the plaintiff was a po-

[5]

lice officer bringing a 42 U.S.C. § 1983 action under the Civil Rights Act. He sought to be reinstated as an officer and collect his back pay under a property and liberty interest theory. The Supreme Court held the claimed right or interest must be created under state law and that it would defer to state statutes and case law.

In G.L. c. 31, §§ 20D and 43, there is a clear distinction between the rights afforded an employee who is classified as permanent and one who is classified probationary. The employee who is classified as probationary is not entitled to notice and a hearing; therefore, under *Bishop v. Wood, supra,* the Constitutional protections of due process do not require notice and a hearing.

The employee cites *Canney v. Municipal Court of the City of Boston,* Mass. Adv. Sh. (1975) 2878, 335 N.E. 2d 651 in support of the proposition that the sufficiency of a hearing voluntarily afforded an employee may be reviewed under due process guidelines.

The above-mentioned case relates to the termination of an employee who was not in his probationary period. It does not apply to a probational employee, such as the plaintiff. Due process is a protean process which imports different procedures in different situations or circumstances. The very nature of due process negates any concept of inflexible procedures universally applied to every imaginable situation. *Haverhill Manor, Inc. v. Committee of Public Welfare,* Mass. Adv. Sh. (1975) 1813, 330 N.E. 2d 180, 187.

The employee relies upon *Stetson v. Board of Selectmen of Carlisle,* Mass. Adv. Sh. (1976) 502, 343 N.E. 2d 382, 386 to support his argument that the reputation of the plaintiff was seriously damaged and

General Laws, Chapter 31.

§ 20D. [Probationary Period.]

Except as otherwise expressly provided in this chapter or in section thirty-six of chapter forty-eight, no person shall be regarded as holding office or employment on a full-time basis until he has been appointed to a permanent, full-time position in the official or labor service and has actually performed the duties of the office or position thereof for a probationary period of six months; provided, however, in the case of a person appointed as a regular police officer in any city or town, the metropolitan district police force, or the Massachusetts Bay Transportation Authority police force or as a capitol police officer, the probationary period shall be nine months. There shall be no increase in pay or change in the duties of any such office or position during such a period without the approval of the administrator. If any such increase in pay or change in duties is made during such a period without such approval, the administrator may cancel and declare void the certification under which the appointment was made, and thereupon the employment of the person so appointed shall cease.

If the conduct or capacity of a person serving a probationary period under an appointment in the official service or labor service, or the character or quality of the work performed by him, is not satisfactory to the appointing authority, he may, at any time after such person has served thirty days and prior to the end of such probationary period, give such person a written notice to that effect, stating in detail the particulars wherein his conduct or capacity or the character or quality of his work is not satisfactory, whereupon his service shall terminate. The appointing authority shall at the same time send a copy of such notice to the administrator. In default of such a notice, the appointment of such person shall become permanent upon the termination of such period; provided, however,

that the administrator with the approval of the commission, may establish procedures assuring the evaluation by appointing authorities of the performance of police officers during such probationary period.

Persons appointed to a permanent office or position which is less than full-time, including appointments on a reserve, intermittent, call, recurrent or part-time basis, shall be deemed to be the holders of such office or position on the basis of the type of such appointment approved by the administrator and shall not be discharged or removed except as hereinafter provided. Each appointing authority having any such an office or position under his control shall employ such persons according to a fair and equitable arrangement which shall provide all such persons with an equal opportunity for employment. If any such person refuses to accept employment which is regularly recurrent or seasonable at stated periods, or on three separate occasions refuses to accept employment under the conditions of his appointment when said appointment calls for employment if, as and when needed, however entitled, without submitting to the appointing authority in writing satisfactory reason for such refusal, notwithstanding the provisions of sections forty-three and forty-five, the services and tenure of such person shall thereupon cease. The appointing authority shall give such a person a written notice setting forth the occasion of such refusal or refusals, as the case may be, and the date upon which the service of said person ceased and at the same time shall forward a copy of such notice to the administrator.

The provisions of this section, relative to the termination of service during a probationary period because the conduct or capacity of such a person or the character or quality of his work was not satisfactory, shall apply provided the person has been assigned to employment for a sufficient amount of time to provide a fair and adequate test, including employment for

at least thirty days, or the equivalent thereof, which need not be consecutive. If a person has not been employed by the appointing authority for thirty days, or the equivalent thereof, during the first eighteen months following his permanent appointment to office or employment which is less than full-time, in default of the thirty day trial period of actual employment, such appointment of the person shall become permanent upon the termination of said eighteen months.

If a person is unable to work because of illness during the serving of his probationary period, the appointing authority shall have discretionary authority to suspend the serving of the probationary period, provided that the person has served an adequate amount of time to satisfy the appointing authority that his services should be retained. Each person so absent shall upon resuming employment be required to complete service equivalent to a full probationary period.

If a person at the time of his appointment or during the serving of his probationary period is not actually employed because of educational leave, he shall not be regarded as holding office or employment until he has served a full probationary period or the remainder of it, as the case may be, following the termination of said educational leave and his commencing of or return to employment.

§ 43. [Discharge, Removal, Suspension, Transfer, Reduction in Grade or Abolition of Office of Certain Persons in Classified Public Service; Punishment Duty Imposed on Police Officers.]

(*a*) Every person holding office or employment under permanent appointment in the official or labor service of the commonwealth, or of any county, city or town thereof, shall have unlimited tenure of office or employment, subject to the provisions of this chapter and the rules made thereunder. He shall not be discharged, removed, suspended for a period exceeding

five days, laid off, transferred from such office or employment without his consent in writing if he held office or employment prior to October fourteen, nineteen hundred and sixty-eight, lowered in rank or compensation without his consent in writing, nor shall his office or position be abolished, except for just cause and for reasons specifically given him in writing. Before any action affecting employment or compensation referred to in the preceding sentence is taken, the officer or employee shall be given a written statement of the specific reason or reasons for the contemplated action, together with a copy of sections forty-three, forty-five and forty-six A, and shall be given a full hearing before the appointing authority on the specific reason or reasons given, of which hearing he shall have at least three days' written notice from the appointing authority, except in cases of separation from service in the official or labor service, resulting from lack of work or lack of money or from abolition of positions, in which case at least seven days' written notice of hearing shall be given by the appointing authority. Within two days after completion of said hearing, the appointing authority shall give to the employee affected a written notice of his decision, stating fully and specifically the reasons therefor.

(*b*) If within five days after receiving written notice of the decision of the appointing authority the person so discharged, removed, suspended, laid off, transferred, lowered in rank or compensation, or whose office or position was abolished, shall so request in writing, he shall be given a hearing before a member of the commission or some disinterested person designated by the chairman of the commission. Said hearing shall be commenced in not less than three nor more than ten days, and shall be completed within thirty days, after the filing of such request, unless, in either case, both parties thereto shall otherwise agree in writing, or unless a continuance is deemed necessary or advisable in the discretion of the hearing

officer, and the findings shall be reported forthwith to the commission for action. The decision of the commission shall be in writing and notice thereof sent to all parties concerned within ten days after the filing of the report. If the commission finds that the action of the appointing authority was justified, such action shall be affirmed; otherwise, it shall be reversed and the person concerned shall be returned to his office or position without loss of compensation. The commission may also modify any penalty imposed by the appointing authority.

(*c*) Any hearing under this section shall, if either party concerned so requests in writing, be public, and at any such hearing the person concerned shall be allowed to answer the charges preferred against him either personally or by counsel.

(*d*) The reasons, notices and answers and the order of discharge, removal, suspension, layoff, transfer, lowering in rank or compensation or abolition of the office or position, and the facts as found by the commission, shall be subject to judicial review by the municipal court of the city of Boston or by the district court within the judicial district of which such person resides, as provided in section forty-five.

(*e*) A suspension for a period not exceeding five days may be made only by the appointing authority or by a subordinate to whom authority to make such suspensions has been delegated, or by a chief of police, or officer performing similar duties, however entitled, or by a subordinate to whom such authority has been delegated by him, and shall be made only for just cause. The officer or employee suspended shall be reinstated by the person authorized to make the suspension at the expiration of the period of such suspension, but shall not be entitled to compensation for such period unless, as hereinafter provided, the suspension is found after hearing or upon appeal to have been without just cause. Within twenty-four hours after his suspension, such officer or employee shall be given a copy

of sections forty-three, forty-five and forty-six A, by the person authorized to make the suspension, together with a written notice stating the specific reason for the suspension and informing him that he may, within forty-eight hours of his receipt of such notice, request in writing a hearing by the appointing authority on the question of whether there was just cause for the suspension and if he so requests he shall be given a hearing within five days of the receipt of such request by the appointing authority. A copy of the notice of suspension to the officer or employee shall be forwarded forthwith to the personnel administrator by the person authorized to make the suspension, together with a request for the approval of reinstatement of the officer or employee to be effective at the expiration of the period of suspension. Whenever such hearing is given the appointing authority shall give the officer or employee suspended a written notice of his decision within two days after the hearing. An officer or employee whose suspension under this paragraph is decided, after hearing, to have been without just cause shall be deemed not to have been suspended and he shall be entitled to compensation for the period for which he was suspended, and if it is decided, after hearing, that there was just cause for such suspension such officer or employee may appeal to the commission as provided in paragraph (*b*) and he shall be entitled to judicial review of the action taken by the commission as provided in paragraph (*d*). The provisions of paragraph (*c*) shall apply to all hearings under this paragraph. No officer or employee shall be subsequently discharged, removed, suspended for a period exceeding five days, laid off, transferred from his office or employment without his consent if he held office or employment prior to October fourteen, nineteen hundred and sixty-eight or lowered in rank or compensation, nor shall his office or position be abolished, for the same specific reason or reasons for which he was originally temporarily suspended for a period

not exceeding five days under this paragraph except in accordance with paragraph (*a*).

Notice of any action taken by the appointing authority under this paragraph shall be forwarded forthwith to the personnel administrator.

(*f*) An officer or employee shall automatically be reinstated at the end of the first period for which he was suspended. Any subsequent reinstatement after suspension shall be subject to the approval of the administrator, and, if denied, an appeal may be taken to the commission as provided in paragraph (*b*) of section two. The notice required by paragraph (*a*) of this section to be given to an employee whom it is proposed to suspend after a prior suspension shall state that his reinstatement after such suspension is subject to the approval of the administrator.

(*g*) Punishment duty shall not be imposed without just cause upon any police officer or fire fighter subject to this chapter. A police officer or fire fighter upon whom punishment duty is imposed shall, within twenty-four hours of the imposition of such punishment duty, be given a copy of this section and of section forty-five, together with a written notice stating the specific reason for the imposition of such punishment duty and the duration thereof and informing him that he may, within forty-eight hours of receipt of such notice, request in writing a hearing by the appointing authority, and if he so requests he shall be given a hearing within five days of receipt of such request by the appointing authority. A copy of the notice of imposition of punishment duty shall be forwarded forthwith to the personnel administrator. Whenever such hearing is given, the appointing authority shall give the police officer or fire fighter upon whom the punishment duty is imposed a written notice of his finding within two days after the hearing. If, after such hearing, the appointing authority finds no just cause exists for the imposition of punishment duty, such

punishment duty shall be deemed not to have been imposed; if, after such hearing, the appointing authority finds that just cause does exist for the imposition of punishment duty, the police officer or fire fighter upon whom the punishment duty is imposed may appeal to the commission as provided in paragraph (*b*), and he or the appointing authority shall be entitled to judicial review of the action taken by the commission as provided in paragraph (*d*). The provisions of paragraph (*c*) shall apply to all hearings under this paragraph. Notice of any action taken by the appointing authority under this paragraph shall be forwarded forthwith to the personnel administrator.

(*h*) Any person holding office or employment under permanent appointment in the official or labor services of the commonwealth, or any county, city, town or district thereof who has incurred expense in defending himself against an unwarranted discharge, removal, suspension, laying off, transfer, lowering in rank or compensation, or abolition of his position, shall, if he engages an attorney for such defense, be reimbursed for such expense; provided, however, that the amount of such reimbursement shall in no event exceed an aggregate sum of nine hundred dollars. Such reimbursement, in each instance, shall be limited to a sum not to exceed two hundred dollars in: —

(1) a hearing by the appointing authority;

(2) a hearing by the civil service commission;

(3) a judicial review by the municipal court of the city of Boston or by the district court within the judicial district where such person resides, as provided in section forty-five.

In addition thereto, reimbursement in each instance shall be limited to a sum not to exceed one hundred dollars for: —

(1) summons of witnesses;

(2) cost of stenographic transcript;

(3) any other necessary expense incurred in such defense.

Any such person shall, upon written application made to his appointing authority within thirty days from final disposition of his case be reimbursed from the same source from which his salary is paid. Such reimbursement shall be paid within thirty days from the receipt of such written application by the appointing authority. No reimbursement shall be made except upon receipt of satisfactory proof that such expenses were actually incurred for the purposes set forth in this section.

(*i*) In the computation of any period of time limited by this section, Saturdays, Sundays and holidays shall be excluded.

(*j*) The provisions of this section or sections forty-five and forty-six A shall not apply to any person who has been reported as on unauthorized absence as provided for in section eighteen.

§ 46A. [Petition for Writ of Mandamus for Reinstatement of Certain Persons; Complaints May Be Filed with Civil Service Commission.]

The supreme judicial court shall have jurisdiction of any petition for a writ of mandamus for the reinstatement of any person alleged to have been illegally discharged, removed, suspended, laid off, transferred, lowered in rank or compensation, or whose office or position is alleged to have been illegally abolished under this chapter; provided, that such petition shall be filed in said court within six months next following such allegedly illegal discharge, removal, suspension, laying off, transfer, lowering in rank or compensation, or abolition of his position, unless said court for cause shown extends the time.

If any person alleges that his employment or compensation has been affected by action of the appointing authority in failing to follow the requirements of section forty-three, he may file a complaint with the civil service commission within seven days, exclusive of Saturdays, Sundays and holidays, after the

said action has been taken. Said complaint shall set forth just how the appointing authority has failed to follow the requirements of section forty-three. This complaint may be filed with the request of the said person for a hearing under the provisions of said section forty-three and if it is determined by the civil service commission that the said authority has failed to follow the requirements of section forty-three and that the rights of said person have been prejudiced thereby, the said commission may order the said appointing authority to restore immediately said person to his employment without loss of compensation or other rights.

General Laws, Chapter 231A.

§ 1. [Courts Authorized to Make Declarations of Right, Duty, Status and Other Legal Relations; Jury Trial.]

The supreme judicial court, the superior court, the land court and the probate courts, within their respective jurisdictions, may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is specifically set forth in the pleadings and whether any consequential judgment or relief is or could be claimed at law or in equity or not; and such proceeding shall not be open to objection on the ground that a merely declaratory judgment or decree is sought thereby and such declaration, when made, shall have the force and effect of a final judgment or decree and be reviewable as such; provided, that nothing contained herein shall be construed to authorize the change, extension or alteration of the law regulating the method of obtaining service on, or jurisdiction over, parties or affect their right to trial by jury. When a declaration of right, or the granting of further relief based thereon, shall involve the determination of issues of fact triable by a jury as of right and as to which a jury trial is duly claimed by the party entitled thereto, or issues which the court, in accordance with the practice of courts of equity, considers should be tried by a jury, such issues may be submitted to a jury in the form of questions, with proper instructions by the court whether a general verdict be required or not.

Massachusetts Rules of Civil Procedure.

Rule 56.

Summary Judgment.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories,

and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule,

must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Supreme Court, U.S.
FILED
JUN 29 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1506.

ROBERT W. MACE,
PETITIONER,

v.

BYRON J. MATTHEWS, MAYOR OF THE CITY OF NEWBURYPORT,
RESPONDENT.

Brief of the Respondent in Opposition to Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts.

RICHARD B. JONES,
CITY SOLICITOR,
28 Green Street,
P.O. Box 190,
Newburyport, Massachusetts 01950.
(617) 462-8365

JOHN C. STEVENS, III,
53 State Street,
Newburyport, Massachusetts 01950.
(617) 462-4416

ADDISON C. GETCHELL & SON, INC. - THE LAWYERS' PRINTER - BOSTON

Table of Contents.

Argument 1

I. Respondent complied with the procedures promulgated by c. 31, § 20D of the Massachusetts General Laws governing the dismissal of a police officer serving a probationary period 1

II. Petitioner must establish a property or liberty interest contemplated within the due process clause of the Fourteenth Amendment before due process applies 3

III. Petitioner has no property interest in continued employment 3

IV. Reputation alone does not invoke the protection of the due process clause 4

V. Alleged falsity of testimony given at hearing does not enhance petitioner's due process claim 5

VI. Petitioner is not foreclosed from future employment 6

VII. Even if this court finds that petitioner was deprived of a property or liberty interest, petitioner was afforded due process 7

Conclusion 10

Table of Authorities Cited.

CASES.

Bishop v. Wood, 426 U.S. 341 (1976) 3, 4, 5, 6, 10

Board of Regents v. Roth, 408 U.S. 564 (1972) 3, 4, 6

Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) 9

Codd v. Velger, 429 U.S. 624 (1977) 6, 7

Mazaleski v. Treusdell, 562 F. 2d 701 (D.C. Cir. 1977) 6
Morrissey v. Brewer, 408 U.S. 471 (1972) 7
Mullane v. Central Hanover Trust Co:,339 U.S. 306 (1950) 7
Paul v. Davis, 424 U.S. 693 (1976) 3, 4, 5
Scott v. Manager State Airport, Hanscom Field, 336 Mass. 372, 145 N.E. 2d 706 (1957) 2
Sullivan v. Municipal Court of Roxbury District, 322 Mass. 566, 78 N.E. 2d 618 (1948) 2
Thibeault v. City of New Bedford, 342 Mass. 552, 174 N.E. 2d 444 (1961) 2
Vigoda v. Barton, 338 Mass. 302, 155 N.E. 2d 409 (1959) 2

CONSTITUTIONAL PROVISIONS AND STATUTE.

United States Constitution, Fourteenth Amendment 3, 4, 6, 11
Mass. G.L. c. 31, § 20D 1, 2, 4, 7, 9, 10
Mass. G.L. c. 31, § 43 5

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1506.

ROBERT W. MACE,
PETITIONER,
v.
BYRON J. MATTHEWS, MAYOR OF THE CITY OF NEWBURYPORT,
RESPONDENT.

Brief of the Respondent in Opposition to Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts.

Argument.

I. RESPONDENT COMPLIED WITH THE PROCEDURES PROMULGATED BY C. 31, § 20D OF THE MASSACHUSETTS GENERAL LAWS GOVERNING THE DISMISSAL OF A POLICE OFFICER SERVING A PROBATIONARY PERIOD.

For a proper dismissal of a probationary police officer, c. 31, § 20D of the Massachusetts General Laws requires

that the employee be in a probationary period, and that he be given written notice stating in particular the reasons why his conduct, capacity or performance is deemed unsatisfactory to the appointing authority (Exhibit D, App. 17a-18a). The two material facts, namely that petitioner was serving a probationary period as a police officer in the City of Newburyport, and that he was given written notice of his dismissal, have been unquestionably established (Exhibit A and Exhibit B, App. 8a-12a).

The legal sufficiency of the notice given petitioner is evident from the face of the document (Exhibit A, App. 8a-10a). Technical precision is not required in such notices, *Sullivan v. Municipal Court of Roxbury District,* 322 Mass. 566, 577, 78 N.E. 2d 618, 622 (1948), nor is the validity of the notice required by c. 31, § 20D made conditional upon a copy being sent to the director of Civil Service. *Thibeault v. City of New Bedford,* 342 Mass. 552, 558, 174 N.E. 2d 444, 448 (1961).

Under Massachusetts law, the reasons for termination given by an appointing authority in a notice of dismissal must be taken as final on the facts. *Scott v. Manager State Airport, Hanscom Field,* 336 Mass. 372, 145 N.E. 2d 706 (1957). All the appointing authority must find is that the conduct or capacity of the probationary employee, or the character or quality of his work, is not satisfactory. The probationary employee has no right to challenge or question the appointing authority's judgment or reasons. *Vigoda v. Barton,* 338 Mass. 302, 155 N.E. 2d 409 (1959).

As a courtesy, petitioner was also offered notice and an opportunity to be heard (Exhibit B, App. 11a-12a). Petitioner accepted this offer. He now claims that this hearing violated due process.

It is submitted that petitioner was afforded more than due process due to the fact that petitioner was represented

by counsel who was present throughout the hearing; petitioner's attorney cross-examined his accuser; petitioner testified in his own behalf; and counsel for both the respondent and petitioner's accuser were also present.

II. Petitioner Must Establish a Property or Liberty Interest Contemplated within the Due Process Clause of the Fourteenth Amendment before Due Process Applies.

The issue is whether the Due Process Clause of the Fourteenth Amendment entitles petitioner to any greater procedural protection than was afforded him. A threshold requirement in a public employee dismissal case is that the petitioner show either that he has a legitimate entitlement to the job which would be protected as a property interest under the Fourteenth Amendment, or that his dismissal deprives him of a liberty interest protected by the Fourteenth Amendment. *Board of Regents v. Roth.* 408 U.S. 564 (1972), *Paul v. Davis,* 424 U.S. 693 (1976).

III. Petitioner Has No Property Interest in Continued Employment.

Petitioner admits no property interest in continued employment (Petitioner's brief at pp. 15, 16). The sufficiency of the claim of entitlement to continued employment must be decided by reference to state law. *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972); *Bishop v. Wood,* 426 U.S. 341, 344 (1976). In *Bishop v. Wood,* this Court held that a former policeman's employment status was not a property interest of which he had been deprived under the Due Process Clause of the Fourteenth Amendment, because North Carolina law gave no guaranty of continued employment either by statute or by contract. This Court declined to make an independent examination of the state law issue. Id. at 347.

Like the former policeman in *Bishop v. Wood*, petitioner held his position at the " 'will and pleasure of the city.' " Id. at 345. As a probationary employee, petitioner's position was terminable at the will of the respondent, the appointing authority of the City of Newburyport, if the conduct or performance of the employee was unsatisfactory pursuant to Mass. G.L. c. 31, § 20D. It is submitted that since petitioner cannot claim a legitimate entitlement to continued employment, he was not deprived of a property interest protected by the Due Process Clause of the Fourteenth Amendment.

IV. Reputation Alone Does Not Invoke the Protection of the Due Process Clause.

Since petitioner admits that he has no property interest in continued employment, he claims a property and liberty interest in professional and personal reputation. In *Paul v. Davis*, 424 U.S. 693, 701 (1976), this Court made clear that any harm to interest in reputation, even where inflicted by a state official, does not result in a deprivation of any property or liberty interest and therefore does not invoke the procedural protection of the Due Process Clause.

Reputation is not a candidate for special protection over and above other interests that may be protected by state law. Where the allegation is stigmatization by a state official, the remedy suggested by this Court in *Paul v. Davis* is a common law claim for defamation under state law. Id. at 698.

In *Board of Regents v. Roth*, this Court stated that it would stretch the concept of liberty too far to suggest that a person is deprived of liberty when he simply is not retained in one position, but remains as free as before to seek another. 408 U.S. 564, 575 (1972). In *Bishop v. Wood*, this Court extended the conclusion of *Roth* to the "discharge" of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge. 426 U.S. 341, 348 (1976).

As in *Bishop v. Wood*, the charges against petitioner were communicated to him privately in writing. In the letter, respondent informed the petitioner that although as a probationary officer he had no right to a hearing, as a courtesy to him, he would be given an opportunity to tell his side of the story at a hearing to be held for the tenured police officers involved, pursuant to Mass. G.L. c. 31, § 43.

The general outline of the complaint was made public only after the hearing, which petitioner agreed to attend, was underway. At the request of the respondent, the hearings were closed to the public in an effort to protect the petitioner's reputation. The outcome of the hearing, at which Mace was given the opportunity to testify and cross-examine his accuser either personally or by counsel, was made public only after the respondent had weighed all the evidence and had informed petitioner of the decision. In *Paul v. Davis*, shortly after the police had circulated a flyer listing the plaintiff as a shoplifter, the charges against him were dismissed. Although the criminal charges were false and publicly disclosed, this Court did not recognize reputation alone as a property or liberty interest.

V. Alleged Falsity of Testimony Given at Hearing Does Not Enhance Petitioner's Due Process Claim.

The alleged perjury of the sworn witnesses does not automatically invoke the procedural protection of the Due Process Clause unless petitioner can first establish the existence of a property or liberty interest. In *Bishop v. Wood*, since summary judgment was granted by the district court, this Court accepted the dismissed police of-

ficer's version of the facts. Therefore, this Court assumed that the policeman's discharge was a mistake because it was based on incorrect and false information. Furthermore, this Court held that the truth or falsity of the City Manager's statement about the police officer neither enhanced nor diminished the police officer's claim that his constitutionally protected interest in liberty had been impaired. *Bishop v. Wood*, 426 U.S. 341, 349 (1976). In *Codd v. Velger*, 429 U.S. 624 (1977), this Court held that since the district court had found that an untenured police officer had no Fourteenth Amendment property interest in continued employment, the adequacy or even the existence of reasons for failure to rehire him presents no federal constitutional question.

VI. Petitioner Is Not Foreclosed from Future Employment.

Petitioner does not allege that he is "foreclosed" from employment in other occupations or in his chosen profession. He merely alleges that the accusation against him "could 'seriously impair his right to secure other employment, more especially in the law enforcement field' " (Petitioner's brief at p. 13). In *Mazaleski v. Treusdell*, 562 F. 2d 701, 713 (D.C. Cir. 1977) petitioner there used similar language. The Court, citing *Roth*, stated that "to infringe one's liberty, the effect of government action . . . must extend beyond a disadvantage or impediment; it must 'foreclos[e] his freedom to take advantage of other employment opportunities.' "

The barrier of which petitioner complains is a practical one, not a legal one. *Mazaleski* at 713. Although it is possible that disclosure of the reasons for petitioner's discharge may interfere with his opportunities for subsequent employment, petitioner is not disqualified from engaging

in any of the common occupations of life, nor is he effectively deprived of a future possibility to pursue his chosen profession. Id. at 713. There is no Civil Service regulation which "forecloses" petitioner from seeking employment in other cities or towns. Nor is petitioner foreclosed from seeking police work in cities and towns where Civil Service regulations are not in force.

VII. Even If This Court Finds that Petitioner Was Deprived of a Property or Liberty Interest, Petitioner Was Afforded Due Process.

If this Court finds petitioner's alleged stigmatization constitutes a liberty and/or property interest, the question remains as to what process is due. It is submitted that petitioner was afforded due process under the circumstances of this case. "It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Notice and an opportunity to be heard must be appropriate to the nature of the case. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950). The hearing required where a nontenured police officer has been stigmatized in the course of a decision to terminate his employment is solely to provide an opportunity to clear his name. *Codd v. Velger*, 429 U.S. 624 (1977).

Although under Mass. G.L. c. 31, § 20D, respondent could have dismissed petitioner without a hearing, in the spirit of justice and fair play, petitioner was afforded notice of the charges against him (App. 11a-12a) and a formal pretermination hearing at which he had the opportunity to tell his side of the story and to clear his name. The notice provided by respondent specifically states: ". . . as a

courtesy to you I want to give you every opportunity to present your side of the matter. You shall be allowed to answer the charges preferred against you either personally, or by counsel" (Exhibit B, App. 12a).

Petitioner's contention that the hearing was a "due process shambles" is completely without foundation. The hearing took place on April 8, 1979. Among those present at the hearing were petitioner and his attorney, Mr. David Downes, complainant Russell Janvrin and his attorney, Mr. Harvey Beit, and respondent and his attorney, City Solicitor James Lagoulis. At the outset, the respondent stated that the purpose of the hearing was to hear evidence on both sides. At respondent's request, the hearing was closed to the public and all witnesses were duly sworn and testified under oath. All testimony and proceedings of the hearing were taped with the assent of the parties. Petitioner was given the opportunity to testify, present exhibits and cross-examine the witnesses, including his accuser, Russell Janvrin. Each officer involved was given notice that he would be given an opportunity to answer charges against him either personally or by counsel.

The tapes disclose that it was agreed by the attorneys representing petitioner, petitioner's accuser and the respondent, that each officer's case would be heard individually. For this reason, only the officer whose case was being heard was present in the room when that officer testified. However, petitioner's attorney represented all three officers against whom charges were brought and was present in the room throughout the entire hearing. Petitioner's attorney cross-examined all of the witnesses, including petitioner's accuser who was cross-examined in the presence of petitioner. In addition, petitioner testified in his own behalf.

Among the witnesses were a physician and nurse from Anna Jaques Hospital who treated the complainant Russell

Janvrin on the night of the alleged misconduct. The complainant Janvrin presented as exhibits photographs taken the day after the alleged assault, which showed bruises on his face and legs, and a bill and physician's report from Anna Jaques Hospital.

When petitioner was absent from the room, petitioner's attorney objected to any questioning relevant to the charges against petitioner while petitioner was absent. This objection was sustained by respondent. Respondent then directed that the question objected to be stricken from the record and then directed the accuser's attorney to limit his questions to the charges against the officer present.

The purpose of the exclusion of petitioner in the manner described above was to give the respondent an opportunity to compare the testimony given by the officers involved, and thereby enable him to better determine its truth or falsity. This procedure, which was assented to by petitioner's attorney, was adopted to insure fairness and justice.

The nature of the hearing afforded petitioner struck an appropriate balance of the competing governmental and private interests involved. In determining what due process requires in a given situation, it is necessary to consider the governmental function involved as well as the private interest affected. *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895 (1961).

The governmental function served by the police force is essential to the democratic process and to the safety of the community. The purpose of the probationary period of Mass. G.L. c. 31, § 20D is to enable the appointing authority of local governments to discharge police officers whose conduct, capacity or performance is deemed unsatisfactory. To require more procedural protection than is required by c. 31, § 20D or than was afforded petitioner in the case

at bar, is to frustrate the intent of the statute by making it impossible for local governments to make their own personnel decisions and by imposing an inordinate fiscal and administrative burden on cities and towns. This Court in *Bishop v. Wood* recognized that the ultimate control of state personnel decisions is and should remain with the States. Id. at 349, n. 14. "The federal court is not the appropriate forum to review the multitude of personnel decisions that are made daily by public agencies." *Bishop v. Wood,* 426 U.S. 341, 349 (1976).

The record makes clear that respondent was not motivated by a desire to curtail or penalize the exercise of petitioner's constitutionally protected rights. In the absence of such a claim, "we must presume that the official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions." *Bishop v. Wood,* 426 U.S. 341, 350 (1976).

Conclusion.

It is submitted that summary judgment was appropriately granted. The only two material facts in the present case are not in genuine issue. The first fact is that the petitioner was in his probationary period. The second fact is that the petitioner was given written notice of his dismissal stating in particular the reasons thereof.

For a proper dismissal of a probationary officer, Mass. G.L. c. 31, § 20D requires that the employee be in a probationary period and that he be given written notice stating in particular the reasons why his conduct or performance was deemed unsatisfactory to the appointing authority.

Since both requirements were satisfied it is appropriate that summary judgment was entered for the respondent as a matter of law.

In the spirit of justice and fair play, petitioner was also afforded notice and a hearing in which he was given every opportunity to be heard and to clear his name.

Even if this Court finds that the nature of petitioner's interest is one within the contemplation of the property of liberty language of the Due Process Clause of the Fourteenth Amendment and therefore some process is due, the record demonstrates that the petitioner was afforded more than due process.

It is submitted that the nature of the notice and the hearing afforded petitioner is well within the flexible scope of the due process protections demanded by this particular situation.

It is respectfully requested that this Court deny petitioner's request that a writ of certiorari issue to the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

RICHARD B. JONES,
CITY SOLICITOR,
28 Green Street,
P.O. Box 190,
Newburyport, Massachusetts 01950.
(617) 462-8365

JOHN C. STEVENS, III,
53 State Street,
Newburyport, Massachusetts 01950.
(617) 462-4416

Supreme Court, U. S.
FILED
AUG 24 1979
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1506.

ROBERT W. MACE,
PETITIONER,

v.

BYRON J. MATTHEWS,
MAYOR OF THE CITY OF NEWBURYPORT,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Reply Brief of Petitioner in Response to Brief of Respondent in Opposition to Petition for Writ of Certiorari.

FRANCIS J. O'ROURKE,
75 Federal Street, Suite 600,
Boston, Massachusetts 02110.
(617) 542-0896
Counsel for Petitioner.

Of Counsel:
BRICKLEY, SEARS & COLE,
75 Federal Street, Suite 600,
Boston, Massachusetts 02110.
(617) 542-0896

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1506.

ROBERT W. MACE,
PETITIONER,

v.

BYRON J. MATTHEWS,
MAYOR OF THE CITY OF NEWBURYPORT,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Reply Brief of Petitioner in Response to Brief of Respondent in Opposition to Petition for Writ of Certiorari.

1. In reply to the respondent's brief in opposition to the petition for a writ of certiorari, the petitioner respectfully calls to the attention of the Court the following points in rebuttal to the factual assertions of the respondent:

(a) Contrary to the assertion of the respondent at p. 2, second paragraph, of his opposition brief, to the effect that "all the appointing authority must find is that the conduct or ca-

pacity of the probationary employee, or the character or quality of his work, is not satisfactory . . .", the requirement of G.L. c. 31, § 20D, continues on to mandate that the appointing authority must give to such probationary employee "a written notice to that effect, stating in detail the particulars wherein his conduct or capacity or the character or quality of his work is not satisfactory, whereupon his service shall terminate." (See also Pet. App. 33a.)

(b) At the same page of respondent's brief, last paragraph thereon, there appears the first of numerous recitations within the opposition brief that go outside the scope of the record before this Court and assert evidentiary matters never heard by any court of the Commonwealth of Massachusetts.

(c) The opposition brief, at p. 4, second full paragraph, seems to mischaracterize the petitioner's grievance so as to suggest that he is claiming that he was defamed or stigmatized by a public official. The fact is that the petitioner alleges that a public official, the appointing authority, dismissed the petitioner from his public employment for reasons stated in detail that in fact were founded on false evidence given by perjurious witnesses, not by the public official. Accordingly, the petitioner does not have, never has had, and never has asserted that he had an action for defamation against the appointing authority. Instead, the petitioner availed himself of G.L. c. 231A, § 1, the Declaratory Judgment statute, the appropriate remedy for a probationary employee to seek judicial review of the circumstances of his dismissal from the civil service. (Pet. 4, 18; Pet. App. 42a.)

(d) The opposition brief, p. 5, second paragraph, again raises evidentiary allegations that never were before the Massachusetts courts and are not within the record before this Court.

(e) At p. 7 of his brief the respondent asserts that "There is no civil service regulation which 'forecloses' petitioner from

seeking employment in other cities and towns. Nor is petitioner foreclosed from seeking police work in cities and towns where civil service regulations are not in force." Again, these factual assertions relate to properly pleaded allegations made by the petitioner in the courts below that presumptively he could have proved, had summary judgment not been granted on grounds quite irrelevant to the substance of his grievance.

The petitioner is prepared to prove that he is too old to take another civil service examination to seek police employment under the Massachusetts civil service system. Trial and, it is hoped, reinstatement are his only remedies. Furthermore, he is prepared to prove that his dismissal by the respondent created a presumption against the civil service requirement of an affirmative showing of good character that in fact is required within the Commonwealth of Massachusetts even by those cities and towns that do not follow the optional civil service regulations. The respondent by letter of March 15, 1978, cited to the Massachusetts Civil Service Commission the charges that he sustained against the petitioner and gave them to the Civil Service Commission as reasons for the petitioner's dismissal from police employment. (See Ex. A, attached.)

(f) The opposition brief, at p. 8, first paragraph, commences yet another evidentiary recitation wholly outside the scope of the record. That paragraph begins with the following sentence: "The tapes disclose that it was agreed by the attorneys representing petitioner, petitioner's accuser, and the respondent, that each officer's case would be heard individually." In the courts below, this case was disposed of on summary judgment by way of an affidavit asserting only that the petitioner was within his probationary period when he was discharged from his employment; that is, the Massachusetts courts never heard the tapes, nor any other evidence.

The danger of consideration by this Honorable Court of these factual assertions is brilliantly illuminated by the third

paragraph on p. 8, referring to witnesses who were, respectively, a physician and a nurse. In fact, these witnesses testified to the accuser's drunkenness and belligerence; they also testified to the physical injuries sustained by the petitioner and alleged to have been inflicted upon him by one of the individuals whom he alleged in his complaint to have given some of the perjured testimony that became the detailed reasons stated by the appointing authority as the basis for the petitioner's dismissal.

This factual rebuttal could continue for several more paragraphs, as does the respondent's improper insertion of largely erroneous factual allegations not within the record. However, suffice it to say that the proceeding at which the perjured testimony was offered in part commenced before the petitioner even arrived at the hearing. The accuser's wife had testified in his support, also perjuriously, and then left the hearing room, passing the petitioner as he sought to enter the respondent's office, where the hearing had already begun. The lady later recanted her testimony as false and coerced by her husband, the accuser, and the petitioner is prepared to prove that recantation at trial by means of objective witnesses. More importantly, the accuser himself later recanted his own perjuries, thus vitiating the detailed reasons for the petitioner's dismissal from employment by the respondent. The petitioner properly pleaded these allegations. He should have an opportunity to prove them.

2. In reply to the points of law within the respondent's opposition brief, the petitioner submits the following assertions in rebuttal.

(a) The respondent relies upon *Codd* v. *Velger*, 429 U.S. 624 (1977). That decision holds, at p. 628, that "[o]nly if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination is such a hearing required." In the within case, a non-

mandatory hearing was held before the employer had adopted and disseminated to this petitioner false reasons based upon perjury as the foundation for the termination of his employment. Note also that the petitioner in *Codd* v. *Velger* was proceeding under 42 U.S.C. § 1983, as well as the Due Process Clause of the Fourteenth Amendment, for the alleged deprivation of a civil right. *Id.* at 627.

The petitioner asserts that *Codd* v. *Velger* stands for the proposition that this Court has held that, since an untenured police officer was found by the District Court to have no Fourteenth Amendment property interest in continued employment, the adequacy or even the existence of reasons for failure to rehire him presents no federal constitutional question. *Id.* at 628. Once again, the respondent dances around the fundamental question that underlies this case and fails to confront it. It is: Where the state statute mandates that a dismissal of a probationary employee must be based on detailed reasons, is it within the permissible constitutional reach of the employer to base his reasons upon perjury and false evidence?

(b) The respondent also relies on *Mazaleski* v. *Treusdell*, 562 F. 2d 701 (D.C. Cir. 1977). At p. 714 of that decision, the court, in ruling in the employee's favor and reversing the summary judgment by the District Court, noted that ". . . [t]he disclosure of these reasons might well interfere with his opportunities for subsequent employment . . .."

(c) Contrary to the respondent's assertion that *Paul* v. *Davis*, 424 U.S. 693 (1976), stands for the proposition that any harm to a reputation interest, even where inflicted by a state official, does not result in the deprivation of liberty or property interests, does not invoke the Due Process Clause procedural protections, and that the appropriate remedy is a common law claim for defamation under state law, *Paul* holds that "reputation alone, apart from some more tangible interests, *such as employment*, does not implicate any 'liberty' or 'property' in-

terests sufficient to invoke the procedural protection of the Due Process Clause." *Id.* at 701. Citing *Board of Regents* v. *Roth*, 408 U.S. 564, 573 (1972), the Court went on to hold that, to establish a claim under § 1983 and the Fourteenth Amendment, more must be involved than simply defamation by a state official. *Id.* at 710.

(d) The respondent asserts that *Scott* v. *Manager, State Airport, Hanscom Field*, 336 Mass. 372 (1957), holds that reasons for a termination notice of dismissal must be taken as final on the facts. A later Massachusetts case, *Canney* v. *Municipal Court of the City of Boston*, 368 Mass. 648, 654 (1975), cited by the petitioner in his petition at p. 18, holds that direct judicial review of dismissal is available nonetheless under the Massachusetts Declaratory Judgments Act, G.L. c. 231A, § 1.

(e) Similarly, the rule in *Vigoda* v. *Barton*, 338 Mass. 302 (1959), also cited by the respondent, does not foreclose judicial review under the rule announced 16 years later in *Canney*. Note that the statute relied upon by the respondent in discharging the petitioner does not say that the appointing authority only must find, as respondent alleges, that the conduct or capacity of the probationary employee or the character or quality of his work is not satisfactory. The statute goes on to require that, in addition, the appointing authority must give the employee a statement of detailed reasons for such a finding. The petitioner contends that those detailed reasons may not be based upon false or perjurious evidence, and that he is entitled to judicial review of those properly pleaded allegations. The fact relied upon for summary judgment by the trial court, that the petitioner was within his probationary employment term at the time of his dismissal, is wholly irrelevant to such considerations.

Respectfully submitted,

FRANCIS J. O'ROURKE,
75 Federal Street, Suite 600,
Boston, Massachusetts 02110.
(617) 542-0896
Counsel for Petitioner.

Of Counsel:
BRICKLEY, SEARS & COLE,
75 Federal Street, Suite 600,
Boston, Massachusetts 02110.
(617) 542-0896

Exhibit A.

Office of the Mayor
CITY HALL
CITY OF NEWBURYPORT
MASSACHUSETTS
01950

RICHARD E. SULLIVAN
Mayor

TELEPHONE 465-8122

March 15, 1978

Commonwealth of Massachusetts
Division of Personnel Administration
1 Ashburton Place
Boston, Mass. 02108

Attn: Mrs. Barbara E. Jarvis, Director, Bureau of Examinations

Dear Mrs. Jarvis:

I am enclosing the certification list and the report supplement showing those willing to accept the appointment to the above captioned position. I have also listed my choices of whom I would like to appoint.

Your attention is called to the fact that the top name on the list has been eliminated based on a conversation between City Solicitor Richard Jones and your legal counsel, Mr. John Burrill which I now explain, and for which supporting material is also enclosed:

The name of Robert W. Mace was deleted because he was previously discharged from the Police Department during his probationary period. He appealed his discharge to the Civil Service Commission which refused to hear the appeal because of his probationary status.

Mace subsequently brought an appeal in Essex County Superior Court as Civil Case #6899 entitled Mace v. Byron J. Matthews (the then Mayor of Newburyport). The discharge was upheld by Superior Court Judge Banks on February 13, 1978. A copy of the allowed motion is attached hereto.

I therefore request that you allow me to remove Mace's name from the list as noted on form 16, part II, so we may proceed to appoint the other worthy candidates. Thank you for your assistance.

Cordially yours,

Richard E. Sullivan, Mayor